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TITLE 4

BUSINESS AND COMMERCIAL LAW

(CHAPTERS 1-24 IN VOLUME 2A; CHAPTERS 25-40 IN VOLUME 2B)

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CHAPTER 42

UNIFORM PARTNERSHIP ACT

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Subchapter 7 — Miscellaneous Provisions

SECTION.
4-42-707. Use of fictitious names.

4-42-707. Use of fictitious names.

(a) No domestic or foreign registered limited liability partnership shall conduct any business in this state under a fictitious name unless it first files with the Secretary of State a form supplied or approved by the Secretary of State giving the following information:

(1) The fictitious name under which business is being or will be conducted by the applicant registered limited liability partnership;

(2) A brief statement of the character of business to be conducted under the fictitious name; and

(3) The name of the registered limited liability partnership, state of organization, and location, giving city and street address, of the registered office in the state of the applicant registered limited liability partnership.

(b) Each such form shall be executed, without verification, in duplicate and filed with the Secretary of State. The Secretary of State shall retain one (1) counterpart and the other counterpart, bearing the file marks of the Secretary of State, shall be returned to the registered limited liability partnership. However, the Secretary of State shall not accept such filing if the proposed fictitious name is the same as, or confusingly similar to, the name of any domestic corporation, limited liability company, limited partnership, limited liability partnership, or any other entity registered with the Secretary of State, or any such foreign entity authorized to do business in the state or any name reserved or registered under § 4-27-402, § 4-27-403, § 4-38-113, § 4-38-114, or § 4-47-109.

(c) Copies of such filed forms, certified by the respective filing officers, shall be admitted in evidence where the question of filing may be material.

(d) If, after a filing under this section, the applicant registered limited liability partnership is dissolved, or, being a foreign registered limited liability partnership, surrenders or forfeits its rights to do business in Arkansas or, whether a domestic or foreign registered limited liability partnership, ceases to do business in Arkansas under the specified fictitious name, such registered limited liability partnership shall be obligated to file with the Secretary of State a cancellation

of its privilege under this section. If such cancellation is not filed, the Secretary of State, upon satisfactory evidence, may cancel such privilege.

(e) If a registered limited liability partnership which has not filed under this section has heretofore or shall hereafter become a party to any contract, deed, conveyance, assignment, or instrument of encumbrance in which such registered limited liability partnership is referred to exclusively by a fictitious name, the obligations imposed upon such registered limited liability partnership under said instrument and the right sought to be conferred upon third parties thereunder may be enforced against it; but the rights accruing to such registered limited liability partnership under said instrument may not be enforced by the registered limited liability partnership in the courts of this state until it complies with this section and pays to the Treasurer of State a civil penalty of three hundred dollars ($300), and in any suit by a registered limited liability partnership upon an instrument which identified it exclusively by a fictitious name, the registered limited liability partnership shall be required to allege compliance with this section.

(f) Compliance with this section does not give a registered limited liability partnership an exclusive right to the use of the fictitious name, and the registration of a fictitious name under this section will not bar the use of the same name as the name of any domestic entity or any foreign entity authorized to do business in this state. But this chapter is not intended to bar any aggrieved party, in such a situation, from applying for equitable relief under principles of fair trade law.

History. Acts 1999, No. 1528, § 5; 2007, No. 15, § 4; 2021, No. 1041, § 27.

Amendments. The 2021 amendment substituted "§ 4-38-113, § 4-38-114" for "§ 4-32-104" in (b).

CHAPTER 46

UNIFORM PARTNERSHIP ACT (1996)

SUBCHAPTER 1 — GENERAL PROVISIONS

4-46-101. Definitions.

RESEARCH REFERENCES

ALR. Construction and Application of Revised Uniform Partnership Act. 70 A.L.R.6th 209.

Subchapter 2 — Nature of Partnership

4-46-202. Formation of partnership.

CASE NOTES

Joint Venture.

Grain, collateral for a creditor's loan, belonged to debtors' estate and not the debtors' joint venture because the joint venture was not a separate legal entity. There was no evidence the joint venture was registered as a separate entity with Secretary of State's office, and there was no evidence the joint venture created separate balance sheets or inventories. Rice v. Carlton Farms, LLC (In re Webb), 474 B.R. 891 (Bankr. E.D. Ark. 2012), aff'd, Bank of England v. Rice, No. 4:12–cv-578–DPM, 2013 U.S. Dist. LEXIS 14531 (E.D. Ark. Feb. 4, 2013), aff'd, Bank of England v. Rice (In re Webb), 742 F.3d 824 (8th Cir. 2014).

4-46-204. When property is partnership property.

CASE NOTES

Partnership Property.

Where sister filed suit to dissolve a family farming partnership, the circuit court clearly erred in awarding a 273-acre farm parcel to the brother as his separate property where the testimony and records showed that it had been operated as if it was partnership property for over 20 years, it was used as collateral for partnership loans, and each of the partners had contributed land, capital, equipment, labor, and management for the farm; the evidence in support of the presumption in subsection (c) of this section was overwhelming and the brother did not sufficiently rebut the presumption. Hitt v. Lyle, 2020 Ark. App. 124, 596 S.W.3d 540 (2020).

Where sister filed suit to dissolve a family farming partnership, the circuit court did not clearly err by finding that a 15-acre plot was one partner's individual property and not partnership property where the evidence showed that the land was a gift to the partner alone, evidenced by the plain language of the deed, which was executed by all partners. Hitt v. Lyle, 2020 Ark. App. 124, 596 S.W.3d 540 (2020).

Subchapter 7 — Partner's Dissociation When Business Not Wound Up

4-46-703. Dissociated partner's liability to other persons.

CASE NOTES

Cited: Hitt v. Lyle, 2020 Ark. App. 124, 596 S.W.3d 540 (2020).

Subchapter 8 — Winding Up Partnership Business

4-46-803. Right to wind up partnership business.

CASE NOTES

Preservation Appropriate.

Where sister filed suit to dissolve a family farming partnership, the assigning of 25% of certain debts to the sister was not clear error under the specific circumstances of the case, even though the debts were incurred after the sister gave notice of her dissolution; the circuit court found that the debts were incurred to maintain the farming operation, and it was likely that the farm would have gone into foreclosure without the loans. Hitt v. Lyle, 2020 Ark. App. 124, 596 S.W.3d 540 (2020).

4-46-804. Partner's power to bind partnership after dissolution.

CASE NOTES

Preservation.

Where sister filed suit to dissolve a family farming partnership, the assigning of 25% of certain debts to the sister was not clear error under the specific circumstances of the case, even though the debts were incurred after the sister gave notice of her dissolution; the circuit court found that the debts were incurred to maintain the farming operation, and it was likely that the farm would have gone into foreclosure without the loans. Hitt v. Lyle, 2020 Ark. App. 124, 596 S.W.3d 540 (2020).

CHAPTER 47

UNIFORM LIMITED PARTNERSHIP ACT (2001)

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

4-47-107. Supplemental principles of law — Rate of interest.

Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

History. Acts 2007, No. 15, § 1; 2013, No. 1124, § 1.

Subchapter 4 — General Partners

4-47-406. Management rights of general partner.

CASE NOTES

General Partner Had Control Over Activities.

Under settlement proposed by trustee, which was not approved, bankruptcy trustee would not only be conveying 49 percent of stock but also giving up a potential cause of action for fraudulent conveyance for the other 51 percent under both bankruptcy law and Arkansas law. Court noted that company was sole general partner of a limited partnership and thus, had 100 percent control over the activities of that partnership under Arkansas law; therefore, if trustee recovered the stock, he would control the entity that conducted most of the farming business of debtor and her family and related entities. In re Caubble, 505 B.R. 857 (Bankr. E.D. Ark. 2014).

Subchapter 9 — Foreign Limited Partnerships

SECTION.

4-47-905. Noncomplying name of foreign limited partnership.

(a) A foreign limited partnership whose name does not comply with § 4-47-108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this State, an alternate name that complies with § 4-47-108. A foreign limited partnership that adopts an alternate name under this subsection and then obtains a certificate of authority with the name need not comply with § 4-38-112. After obtaining a certificate of authority with an alternate name, a foreign limited partnership shall transact business in this State under the name unless the foreign limited partnership is authorized under § 4-38-112 to transact business in this State under another name.

(b) If a foreign limited partnership authorized to transact business in this State changes its name to one that does not comply with § 4-47-108, it may not thereafter transact business in this State until it complies with subsection (a) and obtains an amended certificate of authority.

History. Acts 2007, No. 15, § 1; 2021, No. 1041, § 28.

Amendments. The 2021 amendment substituted "§ 4-38-112" for "§ 4-32-108" twice in (a).

SUBTITLE 5. CONTRACTS, NOTES, AND OTHER COMMERCIAL INSTRUMENTS

CHAPTER 56

GENERAL PROVISIONS

4-56-101. Attorney's fees.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Michael J. Berry, Note: Arkansas's Un-American Approach to Attorney's Fees for Breach of Contract, 42 U. Ark. Little Rock L. Rev. 587 (2020).

4-56-104. Hold harmless clause in construction contracts unenforceable — Definitions.

(a) As used in this section:

(1) "Construction" means any of the following services, functions, or combination of the following services or functions to construct a building, building site, or structure, to construct a permanent improvement to a building, building site, or structure, including sitework:

(A) Alteration;

(B) Design;

(C) Erection;

(D) Reconditioning;

(E) Renovation;

(F) Repair; or

(G) Replacement;

(2)(A) "Construction agreement" means the bargain of the parties in fact, as found in the language of the parties or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in § 4-1-303.

(B) "Construction agreement" does not include an insurance contract, a construction bond, or a contract to defend a party against liability;

(3)(A) "Construction contract" means the total legal obligation that results from the parties' agreement as supplemented by any other applicable law.

(B) "Construction contract" does not include an insurance contract, a construction bond, or a contract to defend a party against liability;

(4) "Gas" means natural gas, including casing-head gas and all other hydrocarbons that are not oil under subdivision (a)(5) of this section;

(5) "Oil" means crude petroleum oil and other hydrocarbons regardless of gravity that are produced at the well in liquid form by ordinary

production methods and are not the result of condensation of gas after it leaves the reservoir; and

(6) "Operator" means a person that has the right as a landowner or by agreement with a landowner to enter on the land of another to explore, drill, and develop for the production of brine, oil, gas, and any other petroleum hydrocarbons.

(b) A provision in a construction agreement or construction contract is void and unenforceable as against public policy if it requires an entity or that entity's insurer to indemnify, defend, or hold harmless another entity against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers.

(c) A provision, covenant, clause, or understanding written in a construction agreement or construction contract that conflicts with the provisions and intent of this section or attempts to circumvent this section by making the construction agreement or construction contract subject to the laws of another state, or that requires any litigation, arbitration, or other alternative dispute resolution proceeding arising from the construction agreement or construction contract to be conducted in another state, is void and unenforceable.

(d) A clause described under subsections (b) and (c) of this section is severable from the construction agreement or construction contract and shall not cause the entire construction agreement or construction contract to become unenforceable.

(e) The provisions of this section do not affect any provision in a construction agreement or construction contract:

(1) That requires an entity or that entity's insurer to indemnify another entity against liability for damage arising out of the death of or bodily injury to persons, or damage to property, but the indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitors, its agents, representatives, subcontractors, or suppliers; or

(2) To provide construction work or services to an operator or other person directly related to activities or operations stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas, including without limitation the planning, construction, site preparation, or installation of equipment, facilities, or structures, on or off at least one (1) site where any exploration or production operations have occurred, are occurring, or will occur.

History. Acts 2007, No. 874, § 2; 2009, No. 540, § 2; 2011, No. 719, § 1; 2015, No. 1110, §§ 1-4; 2015, No. 1120, §§ 1-4.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 2015, No. 1120. The section heading, subdivisions (a)(4) through (6), subsection (b), and subsection (f) of this section were also amended by Acts 2015, No. 1110, §§ 1-4, to read as follows:

"4-56-104. Unenforceable provisions in construction agreements and construction contracts.

"(a)

***

"(4) 'Gas' means natural gas, including casing-head gas and all other hydrocarbons that are not oil under subdivision (a)(5) of this section;

"(5) 'Oil' means crude petroleum oil and other hydrocarbons regardless of gravity that are produced at the well in liquid form by ordinary production methods and is not the result of condensation of gas after it leaves the reservoir; and

"(6) 'Operator' means a person that has the right as a landowner or by agreement with a landowner to enter on the land of another to explore, drill, and develop for the production of brine, oil, gas, and any other petroleum hydrocarbons.

"(b) A clause or provision in a construction agreement or construction contract is void and unenforceable as against public policy to the extent that:

"(1) A party to the construction agreement or construction contract is required to indemnify, defend, or hold harmless another party against:

"(A) Damage from death or bodily injury to a person arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier; or

"(B) Damage to property arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier; or

"(2) The clause or provision requires any litigation, arbitration, or other alternative dispute resolution proceeding arising under the construction agreement or construction contract to be conducted in another state.

***

"(f) The provisions of this section do not affect any provision in a construction agreement or construction contract that requires for the provision of construction work or services to an operator or other person directly related to activities or operations stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas, including without limitation the planning, construction, site preparation, or installation of equipment, facilities, or structures, on or off at least one (1) site where any exploration or production operations have occurred, are occurring, or will occur."

RESEARCH REFERENCES

Ark. L. Notes. Carl Circo, Selected Construction Contract Clauses: From the Routine to the Cutting Edge, 2015 Ark. L. Notes 1800.

4-56-105. Cross-collateralization clauses — Definition.

(a) As used in this section, unless the context otherwise requires, "cross-collateralization clause" means a clause that by its terms grants a security interest established under a separate security agreement, instrument, mortgage, or deed of trust to secure debt or another obligation other than that for which it was specifically incurred, including without limitation a preexisting or subsequent debt or obligation.

(b) A cross-collateralization clause that grants a security interest for a personal, family, household, or commercial purpose is valid and enforceable, whether or not the cross-collateralization clause is specific or general, lists or identifies existing debts or obligations, or secures debts incurred for the same purpose as the original debt.

(c) A cross-collateralization clause is valid and enforceable if the cross-collateralization clause meets the requirements of this section.

(d) A cross-collateralization clause in a security instrument that does not identify the preexisting debt, value, or obligation is not invalid if the cross-collateralization clause meets the requirements of this section.

(e)(1) The failure to comply with this section shall render the cross-collateralization clause void.

(2) A cross-collateralization clause that is void shall not affect or impair the validity of the security agreement, instrument, mortgage, or deed of trust.

(f) This section applies to a security agreement, instrument, mortgage, or deed of trust executed on and after September 1, 2021.

History. Acts 2021, No. 313, § 1.

CHAPTER 57

INTEREST AND USURY

4-57-101. Calculation of interest — Definition.

(a) Whenever in any statute, deed, written or verbal contract, or in any public or private instrument whatever, any certain interest is or may be mentioned, and no period of time is stated for the rate of interest to be calculated, interest shall be calculated at the rate mentioned by the year, in the same manner as if the words "per annum" or "by the year" had been added to the rate.

(b)(1) For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty (30) days.

(2) Interest for any number of days less than a month shall be estimated by the proportion which the number of days shall bear to thirty (30).

(c)(1)(A)(i) In calculating interest for a partial payment that is made on a consumer loan, the interest shall be calculated to the time when the partial payment was made, and the partial payment shall first be applied to the payment of the interest.

(ii) If the partial payment exceeds the interest due on a consumer loan, the balance of the partial payment shall be applied to reduce the principal of the debt.

(B) The method for calculating interest and applying payments under subdivision (c)(1)(A) of this section shall apply to all subsequent payments.

(2) Interest shall not be added to the principal balance of a consumer loan if a payment falls short of paying the interest due.

(3) Subdivisions (c)(1) and (2) of this section do not apply to commercial credit, including without limitation commercial real estate financing transactions.

(4) As used in this subsection, "consumer loan" means an extension of credit for personal, family, or household purposes but does not include credit card debt, open account debt, or installment loans.

(d) The rate of interest under a contract in which a rate of interest is not specified is six percent (6%) per annum.

History. Rev. Stat., ch. 80, §§ 10-12; C. & M. Dig., §§ 7357-7359; Pope's Dig., §§ 9396-9398; A.S.A. 1947, §§ 68-605 — 68-607; Acts 2013, No. 1214, § 1; 2013, No. 1223, § 1.

CASE NOTES

Applicability.

Court applied six percent rate of prejudgment interest to a contract that was silent about the interest rate for unpaid indemnity obligations because, in part, the General Assembly's restoration of the 6% rate through this statute reflected Arkansas's public policy on this question. Mo. & N. Ark. R.R. v. Entergy Ark., Inc., No. 1:10-cv-8-DPM, 2013 U.S. Dist. LEXIS 139204 (E.D. Ark. Sept. 27, 2013).

4-57-102. Reservation or discounting of interest permitted.

It is lawful for a party to loan money in this state by reserving or discounting interest upon commercial paper, mortgages, or other securities for any period authorized by a rule or regulation of the Federal Housing Administration or its successor or for a period of at least thirty-six (36) months, whichever is greater, at any rate of interest agreed upon by the parties not to exceed the applicable rate of interest, if any, prescribed by Arkansas Constitution, Amendment 89, whether the papers or securities for principal or interest are payable in this state, or in any other state, territory, kingdom, or country.

History. Acts 1868, No. 9, § 7, p. 32; 1875, No. 56, § 5, p. 145; 1895, No. 150, § 1, p. 235; C. & M. Dig., § 7355; Pope's Dig., § 9394; Acts 1953, No. 330, § 1; 1961, No. 71, § 1; A.S.A. 1947, § 68-604; Acts 2013, No. 1124, § 2.

4-57-104. Maximum rate of interest permitted.

The parties to a contract may agree in writing to the payment of interest not exceeding the applicable rate of interest, if any, set forth in Arkansas Constitution, Amendment 89, on money due or to become due.

History. Acts 1875, No. 56, § 1, p. 145; C. & M. Dig., § 7353; Pope's Dig., § 9392; A.S.A. 1947, § 68-602; Acts 2013, No. 1124, § 3.

4-57-108. [Repealed.]

Publisher's Notes. This section, concerning usurious consumer loans or credit sales and award of attorney's fees, was repealed by Acts 2013, No. 1124, § 4. The section was derived from Acts 1985, No. 245, § 1; A.S.A. 1947, § 68-614.

4-57-109. Consumer lawsuit lending — Definitions.

(a) As used in this section:

(1) "Consumer" means an individual who is or may become a plaintiff or claimant in a dispute;

(2) "Consumer lawsuit lender" means an individual or entity that engages in consumer lawsuit lending;

(3) "Consumer lawsuit lending" means:

(A) Providing money to a consumer to use for any purpose other than prosecuting the consumer's dispute, the repayment of which is conditioned upon and sourced from the consumer's proceeds from the outcome of the dispute by judgment, settlement, or otherwise; and

(B) Purchasing from a consumer a contingent right to receive a share of the proceeds of the consumer's dispute by judgment, settlement, or otherwise; and

(4) "Dispute" means:

(A) A civil action;

(B) An alternative dispute resolution proceeding; or

(C) An administrative proceeding before an agency or instrumentality of the government of this state.

(b)(1) The maximum rate of interest provided by § 4-57-104 applies to a consumer lawsuit lending transaction.

(2) Any amount paid or payable to a consumer lawsuit lender under a consumer lawsuit lending transaction that exceeds the amount provided by the consumer lawsuit lender to the consumer in connection with a consumer's dispute shall be included as interest for purposes of § 4-57-104.

(c) A contract or agreement governing a consumer lawsuit lending transaction shall:

(1) Be in writing; and

(2)(A) Prominently disclose the annual percentage rate applicable to the consumer lawsuit lending transaction.

(B) The annual percentage rate shall be included in bold, 20-point type and Arial font surrounded by a black rectangle border of line weight one point five (1.5), as follows:

"APR . %"

(d) A violation of this section is:

(1) A deceptive and unconscionable trade practice under § 4-88-107; and

(2) Subject to the penalties, remedies, and enforcement provided by § 4-88-101 et seq.

History. Acts 2015, No. 915, § 1; 2017, No. 261, § 1.

Amendments. The 2017 amendment substituted "black rectangle border of line weight one point five (1.5)" for "1.5 point rectangle" in (c)(2)(B).

CHAPTER 58

ASSIGNMENTS

4-58-102. Assignment of certain instruments authorized.

CASE NOTES

Automobile Insurance Benefits.

Automobile insurer's payment of medpay benefits to a medical center over the insured's objections was upheld where: the policy stated that benefits can be paid "to or for" the insured; sections 23-89-202 and 23-89-204 do not mandate payment only to the insured; section 4-58-102 allows an insured to assign the right to receive insurance proceeds, as the insured had done in this case, and the insurer was obligated by law to honor the assignment and lien; section 23-85-114(b) does not apply to automobile insurance; and there was no evidence that the insured had advised either the insurer or the medical center of a revocation of the specific assignment of benefits to the medical center. United Servs. Auto. Ass'n v. Norton, 2020 Ark. App. 100, 596 S.W.3d 522 (2020).

4-58-105. Completion of assignments — Rights and remedies of debtor and subsequent assignees.

CASE NOTES

Relationship to Other Laws.

Subdivision (b)(2) of this section simply prescribed the legal effect when a party to an assigned account in good faith paid the assignor rather than the unknown assignee; the mere use of the word "trustee," when viewed in the context of the statute as a whole, did not reflect a legislative intent to create the kind of express or technical trust required in the strict and narrow sense under 11 U.S.C. § 523(a)(4), and therefore, the $65,000 debt was not nondischargeable under 11 U.S.C. § 523(a)(4). Arvest Mortg. Co. v. Nail (In re Nail), 680 F.3d 1036 (8th Cir. 2012).

Assignment provision in the mortgage documents merely served as a collection device for miscellaneous proceeds (funds owned by debtor that she was contractually obligated to remit to the mortgage company); thus, even if the settlement proceeds from the builder were miscellaneous proceeds, debtor's alleged failure to comply with the assignment provision was a dischargeable breach of contract, not a nondischargeable embezzlement. Arvest Mortg. Co. v. Nail (In re Nail), 680 F.3d 1036 (8th Cir. 2012).

4-58-106. Powers of assignor after assignment.

CASE NOTES

Cited: United Servs. Auto. Ass'n v. Norton, 2020 Ark. App. 100, 596 S.W.3d 522 (2020).

CHAPTER 59

FRAUD

SUBCHAPTER.

1. Statute of Frauds.

SUBCHAPTER.
2. UNIFORM VOIDABLE TRANSACTIONS ACT.

SUBCHAPTER 1 — STATUTE OF FRAUDS

SECTION.
4-59-101. Contracts, agreements, or promises required to be in writing — Definitions.

4-59-101. Contracts, agreements, or promises required to be in writing — Definitions.

(a) Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any:

(1) Executor or administrator, upon any special promise, to answer for any debt or damage out of his or her own estate;

(2) Person, upon any special promise, to answer for the debt, default, or miscarriage of another;

(3) Person upon an agreement made in consideration of marriage;

(4) Person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them;

(5) Person upon any lease of lands, tenements, or hereditaments for a longer term than one (1) year;

(6) Person upon a contract, promise, or agreement that is not to be performed within one (1) year from the making of the contract, promise, or agreement; or

(7) Person upon a contract, promise, or agreement that results in a waiver of a right protected by the Arkansas Constitution or the United States Constitution.

(b) No promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless the promise is in writing.

(c) No action may be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy, unless the promise or ratification is made by some writing signed by the party to be charged with the promise or ratification.

(d)(1) No action may be maintained by or against any person or entity on any agreement to extend credit or to renew or modify existing credit in an amount greater than ten thousand dollars ($10,000) or to make any other accommodation relating to such credit, unless the agreement is in writing and is signed by the party to be charged with the agreement, or the duly authorized agent of such party.

(2) For the purpose of this section:

(A) "Agreement" means any agreement, contract, promise, undertaking, or commitment, or any modification thereof; and

(B) "Credit" means the loaning of money, the right granted to defer payment of a debt, or to incur debt and defer its payment.

(3) However, nothing in this section shall in any way limit recovery of moneys or collateral which represents or relates to credit actually extended.

History. Rev. Stat., ch. 30, § 1; Rev. Stat., ch. 91, § 34; Acts 1901, No. 169, § 1, p. 322; C. & M. Dig., §§ 4862, 4863, 4869; Pope's Dig., §§ 6059, 6060, 6066; A.S.A. 1947, §§ 38-101 — 38-103; Acts 1989, No. 530, § 1; 2017, No. 980, § 3.

A.C.R.C. Notes. Acts 2017, No. 980, § 1, provided: "Legislative intent.

"(a) The General Assembly intends that it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of one (1) or more of the following fundamental rights, liberties, and privileges guaranteed by the Arkansas Constitution or the United States Constitution:

"(1) The right to due process;

"(2) The right to equal protection;

"(3) Freedom of religion;

"(4) Freedom of speech;

"(5) Freedom of the press;

"(6) The right to keep and bear arms;

"(7) The right to privacy; or

"(8) The right to marry, as 'marriage' is defined by the Arkansas Constitution, to the extent that the definition of marriage does not conflict with federal law or a holding by the United States Supreme Court.

"(b) The General Assembly fully recognizes the right to contract freely under the laws of this state, and also recognizes that this right may be reasonably and rationally circumscribed pursuant to the state's interest to protect and promote the following fundamental rights, liberties, and privileges granted under the Arkansas Constitution or the United States Constitution:

"(1) The right to due process;

"(2) The right to equal protection;

"(3) Freedom of religion;

"(4) Freedom of speech;

"(5) Freedom of the press;

"(6) The right to keep and bear arms;

"(7) The right to privacy; or

"(8) The right to marry, as 'marriage' is defined by the Arkansas Constitution, to the extent that the definition of marriage does not conflict with federal law or a holding by the United States Supreme Court."

Amendments. The 2017 amendment added (a)(7); and made a stylistic change.

RESEARCH REFERENCES

ALR. Action for Fraud or Deceit Predicated upon Oral Contract Within Statute of Frauds or Transaction of Which Oral Contract Was a Part. 30 A.L.R.7th Art. 4 (2018).

CASE NOTES

Analysis

Applicability.
Contracts Concerning Land.
—Essential Terms.
Contracts Not Performed Within Year.

Applicability.

Husband's argument that the trial court had enforced an oral contract, contrary to subsection (d) of this section, was rejected where the trial court was clearly enforcing its order and the parties' written property settlement agreement when it found the husband in contempt. Peace v. Peace, 2016 Ark. App. 406, 500 S.W.3d 169 (2016).

Contracts Concerning Land.

Because no written record could be located of any easement related to the property, appellant was unable to establish what specific property was described in the alleged easement, the length of the term, and whether the alleged easement was personal to the grantees or instead

ran with the land. Cross Cty. Sch. Dist. v. Turbiville, 2020 Ark. App. 478, 612 S.W.3d 723 (2020).

—Essential Terms.

Circuit court did not err in determining that the real estate contract satisfied the statute of frauds. The warranty deed that the parties executed on the same day as the real-estate contract named the Kiker trusts as grantors and provided a formal, legal description of the property. Also, the contract's designation of the premises by street address provided a sufficient key to the property's location to satisfy the statute of frauds. Sloop v. Kiker, 2016 Ark. App. 125, 484 S.W.3d 696 (2016).

Circuit court's order discussed and ruled on appellants' statute-of-frauds argument without deciding whether a $350,000 down payment constituted a penalty. Therefore, appellants' penalty argument was not reviewable by the appellate court. Sloop v. Kiker, 2016 Ark. App. 125, 484 S.W.3d 696 (2016).

Although the circuit court did not specifically rule on whether the contract satisfied the statute of frauds, the contract satisfied the statute of frauds and was enforceable by the seller where the written terms and conditions of the online auction were sufficient to put the LLC on notice as to how the auction would be conducted and the obligations imposed on it by placing a bid. Freeman Holdings of Ark., LLC v. FNBC Bancorp, Inc., 2019 Ark. App. 165, 574 S.W.3d 181 (2019).

Contracts Not Performed Within Year.

Verbal agreement between the parties was enforceable because Arkansas courts recognized lease agreements between a landlord and tenant that were not in writing, and a month-to-month lease was not subject to the one-year provision of the statute of frauds. Ferrell v. Ferrell (In re Ferrell), No. 1:12-CV-1018, 2012 U.S. Dist. LEXIS 154679 (W.D. Ark. Oct. 29, 2012).

Subchapter 2 — Uniform Voidable Transactions Act

Amendments. Acts 2017, No. 1086, § 1 substituted "Uniform Voidable Transactions Act" for "Fraudulent Transfers" in the subchapter heading.

4-59-201. Definitions.

As used in this subchapter:

(1) "Affiliate" means:

(i) a person that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim", except as used in "claim for relief", means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person that has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Insider" includes:

(i) if the debtor is an individual:

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation:

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership:

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien, including child support liens arising under §§ 9-14-230 and 9-14-231.

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

(12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

(16) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

(17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History. Acts 1987, No. 967, § 1; 1997, No. 1296, § 1; 2017, No. 1086, § 1.

Amendments. The 2017 amendment inserted the definitions for "Electronic", "Organization", "Record", and "Sign" and redesignated the remaining subdivisions accordingly; inserted "in fact" in (1)(i)(B); inserted "discretionary" in (1)(ii)(A); inserted "except as used in 'claim for relief'" in (3); rewrote (11); inserted "license" in (16); and made stylistic changes.

CASE NOTES

ANALYSIS

Creditor.
Transfer.

Creditor.

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, the creditor of the deceased had standing to pursue its claim under the Fraudulent Transfers Act, § 4-59-201 et seq., against the transferee beneficiary. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

Transfer.

This subchapter's definition of "transfer" was similar to the definition in the Bankruptcy Code. While the Bankruptcy Code afforded the trustee the ability to avoid transfers made within two years of filing bankruptcy, the Arkansas statute allowed three years from the date of transfer. Despite the one-year difference in the look-back period, however, the statutes were in pari materia and the same analysis applied under both laws. Jacoway v. Svetc (In re Svetc), 521 B.R. 892 (Bankr. W.D. Ark. 2014) (decision under prior law).

4-59-202. Insolvency.

(a) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets.

(b) A debtor that is generally not paying the debtor's debts as they become due, other than as a result of a bona fide dispute, is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(c) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this subchapter.

(d) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

History. Acts 1987, No. 967, § 2; 2017, No. 1086, § 1.

Amendments. The 2017 amendment, in (a), inserted "at a fair valuation", substituted "the sum" for "all" preceding "of the debtor's assets", and deleted "at a fair valuation" at the end; in (b), inserted "other than as a result of a bona fide dispute" in the first sentence and added the second sentence; deleted former (c) and redesignated the remaining subsections accordingly; and made stylistic changes.

4-59-203. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or other person.

(b) For the purposes of § 4-59-204(a)(2) and § 4-59-205, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History. Acts 1987, No. 967, § 3; 2017, No. 1086, § 1.

Amendments. The 2017 amendment, in (b), substituted "purposes" for "purpose" and added "deed of trust, or security agreement".

4-59-204. Transfer or obligation voidable as to present or future creditor.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, as to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subsection (a) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

History. Acts 1987, No. 967, § 4; 2017, No. 1086, § 1.

A.C.R.C. Notes. Acts 2017, No. 1086, § 2, provided: "The General Assembly finds that although the text of this act is in agreement with and will improve Arkansas law, the 2014 Official Uniform Law Commission comment no. 2 and comment no. 8 to Section 4 of the uniform act, which is codified at § 4-59-204, is intended to be persuasive authority but does not represent Arkansas law and should not be considered when interpreting this act."

Amendments. The 2017 amendment substituted "Transfer or obligation voidable as to present or future creditor" for "Transfers fraudulent as to present and future creditors" in the section heading; substituted "voidable" for "fraudulent" in the introductory language of (a); added (c); and made stylistic changes.

RESEARCH REFERENCES

ALR. Purchase of Annuity by Debtor as Fraud on Creditors. 74 A.L.R.6th 549.

CASE NOTES

Analysis

Bankruptcy Proceedings.
Fraudulent Intent.
—Indebtedness or Insolvency.
Miscellaneous Transfers.

Bankruptcy Proceedings.

Chapter 7 debtor was not entitled to a homestead exemption under Ark. Const. Art. IX, § 3 on a house she owned because she committed fraud, in violation of this section and § 4-59-205, when she transferred money out of a trust she managed and used the money to buy the house while the trust was indebted to a bank, and because the debtor was not entitled to a homestead exemption in the house, the bank's judgment lien on the house did not impair the debtor's interest in the house and the debtor's claim seeking an order avoiding the bank's lien under 11 U.S.C. § 522(f) had to be denied. In re Gaddy, No. 5:12-bk-72648, 2013 Bankr. LEXIS 2326 (Bankr. W.D. Ark. June 7, 2013).

Debtor fraudulently transferred and concealed his true interest by titling property in other people's names in order to place it beyond his creditors' reach and thus, transfers were avoided and property was returned to his estate under various provisions of the Bankruptcy Code and this subchapter. Despite serpentine chain of title, debtor continuously possessed and exercised uninterrupted control over property. Jacoway v. Svetc (In re Svetc), 521 B.R. 892 (Bankr. W.D. Ark. 2014).

Fraudulent Intent.

—Indebtedness or Insolvency.

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, summary judgment was improperly granted to the beneficiary as there was a factual issue as to whether

the decedent "reasonably should have believed that she would incur debts beyond her ability to pay as they became due"; this section does not require the creditor to demonstrate the debtor's actual intent. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, summary judgment for the transferee beneficiary was reversed where the creditor presented proof that the IRS had a claim for tax deficiencies dating back several years, that the decedent had multiple creditors, and that her estate was likely insolvent. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

Miscellaneous Transfers.

In a case under this subchapter, there were genuine issues of material fact regarding whether a debtor received a reasonably equivalent value as a result of a transfer to her attorney; at the time of the transfer, the debtor believed or reasonably should have believed that she was incurring debts beyond her ability to pay as they became due. Druyvestein v. Gean, 2014 Ark. App. 559, 445 S.W.3d 529 (2014).

4-59-205. Transfer or obligation voidable as to present creditor.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Except as provided under § 4-59-202(b), a creditor making a claim for relief under subsection (a) or subsection (b) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

History. Acts 1987, No. 967, § 5; 2017, No. 1086, § 1.

Amendments. The 2017 amendment substituted "Transfer or obligation voidable as to present creditor" for "Transfers fraudulent as to present creditors" in the section heading; substituted "voidable" for "fraudulent" in (a) and (b); and added (c).

RESEARCH REFERENCES

ALR. Purchase of Annuity by Debtor as Fraud on Creditors. 74 A.L.R.6th 549.

CASE NOTES

Analysis

Bankruptcy.
Insolvency.
Miscellaneous Transfers.

Bankruptcy.

Chapter 7 debtor was not entitled to a homestead exemption under Ark. Const. Art. IX, § 3 on a house she owned because she committed fraud, in violation of § 4-

59-204 and this section, when she transferred money out of a trust she managed and used the money to buy the house while the trust was indebted to a bank, and because the debtor was not entitled to a homestead exemption in the house, the bank's judgment lien on the house did not impair the debtor's interest in the house and the debtor's claim seeking an order avoiding the bank's lien under 11 U.S.C. § 522(f) had to be denied. In re Gaddy, No. 5:12-bk-72648, 2013 Bankr. LEXIS 2326 (Bankr. W.D. Ark. June 7, 2013).

Insolvency.

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, summary judgment was improperly granted to the beneficiary as this section does not require the creditor to demonstrate the debtor's actual intent; the creditor presented proof that the IRS had a claim for tax deficiencies dating back several years, that the decedent had multiple creditors, and that her estate was likely insolvent. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

Miscellaneous Transfers.

In a case under this subchapter, there were genuine issues of material fact regarding whether a debtor received a reasonably equivalent value as a result of a transfer to her attorney; at the time of the transfer, the debtor believed or reasonably should have believed that she was incurring debts beyond her ability to pay as they became due. Druyvestein v. Gean, 2014 Ark. App. 559, 445 S.W.3d 529 (2014).

4-59-206. When transfer is made or obligation is incurred.

For the purposes of this subchapter:

(1) a transfer is made:

(i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this subchapter that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this subchapter, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in subdivision (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred; and

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

(ii) if evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee.

No court order or judgment of a court shall be an obligation incurred under this subchapter.

History. Acts 1987, No. 967, § 6; 1993, No. 1279, § 2; 2017, No. 1086, § 1.

Amendments. The 2017 amendment substituted "which" for "whom" in (1)(i); and substituted "a record, when the record signed" for "a writing, when the writing executed" in (5)(ii).

4-59-207. Remedies of creditor.

(a) In an action for relief against a transfer or obligation under this subchapter, a creditor, subject to the limitations in § 4-59-208, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law;

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require; and

(4) a settlement agreement with the transferee or a child support creditor or the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration in Title IV-D cases.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

History. Acts 1987, No. 967, § 7; 1997, No. 1296, § 2; 2017, No. 1086, § 1.

Amendments. The 2017 amendment substituted "creditor" for "creditors" in the section heading; substituted "if available under applicable law" for "in accordance with the procedure prescribed by §§ 16-110-201 — 16-110-211" in (a)(2); and made stylistic changes.

CASE NOTES

Analysis

Avoidance of the Transfer.
Transfer on Death.

Avoidance of the Transfer.

In a case under this subchapter, there were genuine issues of material fact regarding whether a debtor received a reasonably equivalent value as a result of a transfer to her attorney; at the time of the transfer, the debtor believed or reasonably should have believed that she was incurring debts beyond her ability to pay as they became due. Druyvestein v. Gean, 2014 Ark. App. 559, 445 S.W.3d 529 (2014).

Transfer on Death.

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, the circuit court erroneously ruled that the probate court had exclusive

jurisdiction and that the circuit court lacked jurisdiction; under Ark. Const. Amend. 80, § 6, and the fact that, under the Uniform Transfer on Death Security Registration Act, § 28-14-101 et seq., the money transferred from the TOD account did not become part of the estate, the circuit court clearly had jurisdiction. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019).

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, the transferee's argument failed that the personal representative of the estate and not the creditor had standing for such an action; while there are procedures within the probate code that would allow for the challenge of an alleged fraudulent conveyance, § 28-14-109 concerning TODs plainly allows creditors to pursue their claims against transferees under other Arkansas laws, and thus a creditor also may pursue its claim under the Fraudulent Transfers Act, § 4-59-201 et seq. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

In creditor's action to set aside an alleged fraudulent conveyance arising from a transfer-on-death (TOD) beneficiary designation, the creditor of the deceased had standing to pursue its claim under the Fraudulent Transfers Act, § 4-59-201 et seq., against the transferee beneficiary. Heritage Props. Ltd. P'ship v. Walt & Lee Keenihan Found., Inc., 2019 Ark. 371, 584 S.W.3d 685 (2019) (decided under pre-2017 version of § 4-59-201 et seq.).

4-59-208. Defenses, liability, and protection of transferee or obligee.

(a) A transfer or obligation is not voidable under § 4-59-204(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor, or against any subsequent transferee or obligee.

(b) To the extent a transfer is voidable in an action by a creditor under § 4-59-207(a)(1), the following rules apply:

(1) except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(i) the first transferee of the asset or the person for whose benefit the transfer was made; or

(ii) an immediate or mediate transferee of the first transferee, other than:

(A) a good-faith transferee that took for value; or

(B) an immediate or mediate good-faith transferee of a person described in subdivision (b)(1)(ii)(A) of this section.

(2) recovery pursuant to § 4-59-207(a)(1) or § 4-59-207(b) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in subdivision (b)(1)(i) or subdivision (b)(1)(ii) of this section.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this subchapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) a lien on or a right to retain an interest in the asset transferred;

(2) enforcement of an obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under § 4-59-204(a)(2) or § 4-59-205 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with chapter 9 of the Uniform Commercial Code, § 4-9-101 et seq., other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(f) A transfer is not voidable under § 4-59-205(b):

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, except to the extent the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(g) The following rules determine the burden of proving matters referred to in this section:

(1) A party that seeks to invoke subsection (a), (d), (e), or (f) has the burden of proving the applicability of that subsection.

(2) Except as otherwise provided in subdivisions (g)(3) and (g)(4), the creditor has the burden of proving each applicable element of subsection (b) or (c).

(3) The transferee has the burden of proving the applicability to the transferee of subdivision (b)(1)(ii)(A) or (b)(1)(ii)(B).

(4) A party that seeks adjustment under subsection (c) has the burden of proving the adjustment.

(h) The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

History. Acts 1987, No. 967, § 8; 2017, No. 1086, § 1.

Amendments. The 2017 amendment added "or obligee" in the section heading; inserted "given the debtor" in (a); rewrote (b); in (e)(2), substituted "Article 9" for "chapter 9" and "other than acceptance of collateral in full or partial satisfaction of the obligation it secures" for "§ 4-9-101 et seq."; substituted "except to the extent" for "unless" in (f)(1); added (g) and (h); and made stylistic changes.

CASE NOTES

Reasonably Equivalent Value.

In a case under this subchapter, there were genuine issues of material fact regarding whether a debtor received a reasonably equivalent value as a result of a transfer to her attorney; at the time of the transfer, the debtor believed or reasonably should have believed that she was incurring debts beyond her ability to pay as they became due. Druyvestein v. Gean, 2014 Ark. App. 559, 445 S.W.3d 529 (2014).

4-59-209. Extinguishment of claim for relief.

A claim for relief with respect to a transfer or obligation under this subchapter is extinguished unless action is brought:

(a) under § 4-59-204(a)(1), not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under § 4-59-204(a)(2) or § 4-59-205(a), not later than four years after the transfer was made or the obligation was incurred; or

(c) under § 4-59-205(b), not later than one year after the transfer was made.

History. Acts 1987, No. 967, § 9; 1993, No. 1279, § 3; 2017, No. 1086, § 1.

Amendments. The 2017 amendment substituted "claim for relief" for "cause of action" in the section heading; substituted "A claim for relief with respect to a transfer" for "A cause of action with respect to a fraudulent transfer" in the introductory language; in (a), substituted "not later than four (4) years" for "within three (3) years" and added "or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant"; substituted "not later than four (4) years" for "within three (3) years" in (b); and, in (c), substituted "not later than one year" for "within one (1) year" and deleted "or the obligation was incurred" at the end.

CASE NOTES

Analysis

Applicability.
Three-Year Look-Back.

Applicability.

In a will contest, the three-year statute of limitations for claims under the Arkansas Fraudulent Transfers Act did not apply because appellee who sought a constructive trust was not a creditor seeking a remedy under that Act; rather, the facts alleged in the petition sounded in tort based on appellant's alleged breach of fiduciary duty and alleged use of undue influence over the decedent, and thus the three-year statute of limitations for torts in § 16-56-105 more aptly applied. Smith v. Smith (In re Estate of Smith), 2020 Ark. App. 113, 597 S.W.3d 65 (2020) (decided under prior version of statute).

Three-Year Look-Back.

This subchapter's definition of "transfer" was similar to the definition in the Bankruptcy Code. While the Bankruptcy Code afforded the trustee the ability to avoid transfers made within two years of filing bankruptcy, the Arkansas statute allowed three years from the date of transfer. Despite the one-year difference in the look-back period, however, the statutes were in pari materia and the same analysis applied under both laws. Jacoway v. Svetc (In re Svetc), 521 B.R. 892 (Bankr. W.D. Ark. 2014) (decision under prior law).

Three-year limitations period of this section barred a judgment creditor from setting aside a husband's quitclaim deed to a wife because (1) the deed was transferred from the husband to the wife over three years before the creditor obtained and filed of record a judgment against the husband, and (2) the equitable doctrine of laches did not apply under § 4-59-210 (now § 4-59-212), since the limitations period passed before the creditor obtained a judgment against the husband. McMahen v. Robinson, 2017 Ark. App. 270, 521 S.W.3d 510 (2017) (decision under prior law).

4-59-210. Governing law.

(a) In this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(b) A claim for relief in the nature of a claim for relief under this subchapter is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

History. Acts 2017, No. 1086, § 1.
Publisher's Notes. Former § 4-59-210 has been renumbered by Acts 2017, No. 1086 § 1, as § 4-59-212.

4-59-211. Application to series organization.

(a) In this section:

(1) "Protected series" means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in subdivision (a)(2) of this section.

(2) "Series organization" means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(i) the organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series.

(ii) debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization.

(iii) debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

(b) A series organization and each protected series of the organization is a separate person for purposes of this subchapter, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

History. Acts 2017, No. 1086, § 1.
Publisher's Notes. Former § 4-59-211 has been renumbered by Acts 2017, No. 1086, § 1, as § 4-59-213.

4-59-212. Supplementary provisions.

Unless displaced by the provisions of this subchapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress,

coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

History. Acts 1987, No. 967, § 10; 2017, No. 1086, § 1.

Publisher's Notes. This section was formerly codified as § 4-59-210.

Former § 4-59-212, concerning short title of the former act, was derived from Acts 1987, No. 967, § 12.

CASE NOTES

Applicability.

Three-year limitations period of § 4-59-209 barred a judgment creditor from setting aside a husband's quitclaim deed to a wife because (1) the deed was transferred from the husband to the wife over three years before the creditor obtained and filed of record a judgment against the husband, and (2) the equitable doctrine of laches did not apply under this section, since the limitations period passed before the creditor obtained a judgment against the husband. McMahen v. Robinson, 2017 Ark. App. 270, 521 S.W.3d 510 (2017) (decision under prior law).

4-59-213. Uniformity of application and construction.

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

History. Acts 1987, No. 967, § 11; 2017, No. 1086, § 1.

Publisher's Notes. This section was formerly codified as § 4-59-211.

Former 4-59-213, concerning acts and parts of acts repealed, was derived from Acts 1987, No. 967, § 13.

4-59-214. Relation to Electronic Signatures in Global and National Commerce Act.

This subchapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History. Acts 2017, No. 1086, § 1.

4-59-215. Short title.

This subchapter, which was formerly cited as the Uniform Fraudulent Transfer Act, may be cited as the Uniform Voidable Transactions Act.

History. Acts 2017, No. 1086, § 1.

CHAPTER 60
CHECKS

SECTION.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled 'Funding and classification of cabinet-level department secretaries' and 'Transformation and Efficiencies Act transition team' should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019."

4-60-102. Applicability.

This chapter does not apply to the laws governing the imposition of a penalty for checks written on accounts which have insufficient funds and which checks are payable to either the Secretary of the Department of Finance and Administration or to the Department of Finance and Administration for any taxes, licenses, or fees imposed by any laws of this state.

History. Acts 1987, No. 66, § 3; 2019, No. 910, § 3355.

Amendments. The 2019 amendment substituted "Secretary of the Department of Finance and Administration" for "Director of the Department of Finance and Administration".

4-60-103. Liability for restitution.

CASE NOTES

Cited: Eliasnik v. Y&S Pine Bluff, LLC, 2018 Ark. App. 138, 546 S.W.3d 497 (2018).

SUBTITLE 6. BUSINESS PRACTICES

CHAPTER 70
GENERAL PROVISIONS

SUBCHAPTER.

SUBCHAPTER 1 — RIGHTS GENERALLY

Effective Dates. Acts 2017, No. 394, § 2: Jan. 1, 2018.

4-70-103. Tickets sold over the internet — Definition.

(a) Tickets of admission to a live entertainment event, theatre, musical performance, or place of public entertainment or amusement of any kind shall not be offered for sale by any person over the internet until the tickets have been placed on sale by the venue or entity hosting the event or its authorized agent.

(b) Internet portals or websites shall not allow a person to offer for resale a ticket of admission to a live entertainment event, theatre, musical performance, or place of public entertainment or amusement of any kind until the tickets have been placed on sale by the venue or entity hosting the event or its authorized agent.

(c) This section does not apply to sporting or athletic events.

(d) As used in this section, "placed on sale" means the date and time when tickets are made available for sale to the general public, including without limitation to fan clubs, businesses, and persons for promotional activities.

History. Acts 2009, No. 573, § 1; 2015, No. 860, § 1.

4-70-104. Heavy equipment rental recovery fee — Definitions.

(a) As used in this section:

(1) "Heavy equipment property" means personal property owned by a business classified within sectors 532310 or 532412 of the North American Industry Classification System, as in effect on January 1, 2017;

(2) "Rental" or "renting" means the rental by a dealer of heavy equipment property:

(A) For a period of less than one (1) year or for an undefined period; or

(B) Under a contract with unlimited terms; and

(3) "Rental charge" means the total charge for the rental of heavy equipment property, excluding any separately itemized costs represent-

ing charges for related nonrental items, including without limitation pickup and delivery, fuel, or a damage waiver.

(b) Except as provided in subsection (c) of this section, a person in the business of renting heavy equipment property in this state may include in a rental agreement or on a rental invoice a recovery fee of one and twenty-five-hundredths percent (1.25%) of the rental charge for the rental of an item of heavy equipment property to a customer located in the state.

(c) The recovery fee provided for in this section shall:

(1) Not be collected on a rental of heavy equipment property to the United States or this state, including without limitation a county, city, town, agency, board, commission, or institution of this state; and

(2) Be exempt from state and local sales and use taxes.

(d) A business that collects a recovery fee as provided in this section shall:

(1) Account for and hold the recovery fees separately from all other business receipts;

(2) Use the amount of the recovery fee collected under this section solely to pay ad valorem taxes levied on the business's tangible personal property located in this state; and

(3)(A) By February 15 of each year, remit to the county in which the business was assessed ad valorem taxes on heavy equipment property any recovery fees collected in the immediately preceding calendar year that exceed the aggregate ad valorem taxes that the business actually paid in that calendar year on the heavy equipment property of the business.

(B) If a business that collects a recovery fee under this section pays ad valorem taxes on heavy equipment property in more than one (1) county, the business shall remit any excess recovery fees not used to pay ad valorem taxes on heavy equipment property of the business to each county based on the ratio of ad valorem taxes paid to the county in the immediately preceding calendar year on the heavy equipment property of the business to the total of all ad valorem taxes paid in any county in the immediately preceding calendar year on heavy equipment property of the business.

(e) This section does not exempt heavy equipment property from ad valorem taxes.

History. Acts 2017, No. 394, § 1.
Effective Dates. Acts 2017, No. 394, § 2: Jan. 1, 2018.

Subchapter 2 — Business Under Assumed Name

SECTION.

4-70-201. Applicability of subchapter.

(a) This subchapter shall not apply to any limited partnership which has filed its certificate of limited partnership with the Secretary of State pursuant to § 4-47-201 or any successor law.

(b) This subchapter shall not apply to any domestic or foreign corporation or to any domestic or foreign limited partnership or limited liability company lawfully doing business in this state.

(c) This subchapter shall not apply to any limited liability company which has filed its articles of organization with the Secretary of State pursuant to § 4-38-201.

History. Acts 1943, No. 11, § 4; 1977, No. 874, § 3; A.S.A. 1947, §§ 70-404, 70-406; Acts 1997, No. 479, § 7; 1997, No. 549, § 1; 1997, No. 912, § 12; 1999, No. 1528, § 7; 2007, No. 15, § 7; 2021, No. 1041, § 29.

Amendments. The 2021 amendment substituted "§ 4-38-201" for "§ 4-32-202" in (c).

CHAPTER 71

TRADEMARKS AND LABELS

SUBCHAPTER.
2. Registration and Protection.

Subchapter 2 — Registration and Protection

SECTION.
4-71-210. Classification.
4-71-217. Fees.

4-71-202. Registrability.

RESEARCH REFERENCES

ALR. Construction and Application of Trademark Registration Prohibition on Disparaging Marks Under 15 U.S.C. § 1052(a). 15 A.L.R. Fed. 3d Art. 8 (2016).

4-71-209. Cancellation.

RESEARCH REFERENCES

ALR. Application of Defense of Laches in Action to Cancel Trademark. 64 A.L.R. Fed. 2d 255.

4-71-210. Classification.

(a) The Secretary of State shall by rule establish a classification of goods and services for convenience of administration of this subchapter, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all

goods upon which, or services with which, the mark is actually being used indicating the appropriate class or classes of goods or services.

(b) When a single application includes goods or services which fall within multiple classes, the Secretary of State may require payment of a fee for each class.

(c) To the extent practical, the classification of goods and services should conform to the classification adopted by the United States Patent and Trademark Office.

History. Acts 1997, No. 1109, § 10; 2019, No. 315, § 127.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a).

4-71-211. Fraudulent registration.

RESEARCH REFERENCES

ALR. Award of Damages or Profits Under § 35(a) of Lanham Act (15 U.S.C. § 1117(a)) for False Designation of Origin and False Descriptions (15 U.S.C. § 1125(a)). 31 A.L.R. Fed. 3d Art. 13 (2018).

4-71-212. Infringement.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Trademark Counterfeiting Statutes. 63 A.L.R.6th 303.

4-71-217. Fees.

(a) The Secretary of State shall by rule prescribe the fees payable for the various applications and recording fees and for related services.

(b) Unless specified by the Secretary of State, the fees payable in this subchapter are not refundable.

History. Acts 1997, No. 1109, § 17; 2019, No. 315, § 128.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a).

CHAPTER 72

FRANCHISES

SUBCHAPTER.

2. Arkansas Franchise Practices Act.

Subchapter 2 — Arkansas Franchise Practices Act

SECTION.

4-72-206. Unlawful practices of franchisors.

4-72-206. Unlawful practices of franchisors.

(a) It is a violation of this subchapter for a franchisor, through an officer, agent, or employee to engage directly or indirectly in any of the following practices:

(1) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve a person from liability imposed by this subchapter;

(2) To prohibit directly or indirectly the right of free association among franchisees for a lawful purpose;

(3) To require or prohibit a change in management of a franchisee unless the requirement or prohibition of change is for a reasonable cause, which cause shall be stated in writing by the franchisor;

(4) To restrict the sale of any equity or debenture issue or the transfer of any security of a franchisee or in any way prevent or attempt to prevent the transfer, sale, or issuance of shares of stock or debentures to employees, personnel of the franchisee, or heirs of the principal owner as long as basic financial requirements of the franchisor are complied with, if the sale, transfer, or issuance does not have the effect of accomplishing a sale of the franchise;

(5) To provide any term or condition in a lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this subchapter;

(6) To refuse to deal with a franchise in a commercially reasonable manner and in good faith; or

(7) To collect a percentage of the franchisee's sales as an advertising fee and not use these funds for the purpose of advertising the business conducted by the franchisee.

(b) A condition, stipulation, or provision requiring the application of the law of another state in lieu of this subchapter is void.

History. Acts 1977, No. 355, § 7; A.S.A. 1947, § 70-813; Acts 2019, No. 835, § 1.

Amendments. The 2019 amendment added (b) and designated the former section as (a); and made stylistic changes.

Subchapter 3 — Farm Equipment Retailer Franchise Protection

4-72-304. Wholesaler, manufacturer, or distributor to repurchase undamaged goods and cover cost of return.

CASE NOTES

Analysis

Applicability.
Allegations Sufficient.

Applicability.

Circuit court properly concluded that a retailer had sufficiently stated a claim under the Arkansas Farm Equipment Retailer Franchise Protection Act where the retailer asserted a violation under this section, not § 4-72-309, and thus, it was not required to allege that it shipped the inventory back to the mower distributor. R.W. Distribs., Inc. v. Texarkana Tractor

Co., 2018 Ark. App. 345, 553 S.W.3d 187 (2018).

Allegations Sufficient.

Retailer's allegations that it had obtained a number of mowers from the distributor for sale in its facilities, it had not sold the items, it demanded that the distributor take the items back pursuant to this section, and the distributor refused to repurchase the goods were sufficient to state a claim. R.W. Distribs., Inc. v. Texarkana Tractor Co., 2018 Ark. App. 345, 553 S.W.3d 187 (2018).

Retailer's allegations that the distributor had provided the equipment within the past 24 months and the retailer had not sold them were sufficient to allege that the inventory was new, unsold, undamaged, and complete. R.W. Distribs., Inc. v. Texarkana Tractor Co., 2018 Ark. App. 345, 553 S.W.3d 187 (2018).

4-72-309. Liability for failure to repurchase.

CASE NOTES

Applicability.

Circuit court properly concluded that a retailer had sufficiently stated a claim under the Arkansas Farm Equipment Retailer Franchise Protection Act where the retailer asserted a violation under § 4-72-304, not this section, and thus, it was not required to allege that it shipped the inventory back to the mower distributor. R.W. Distribs., Inc. v. Texarkana Tractor Co., 2018 Ark. App. 345, 553 S.W.3d 187 (2018).

Subchapter 6 — Procedural Fairness for Restaurant Franchisees

4-72-602. Commencement of civil action or arbitration proceeding.

RESEARCH REFERENCES

ALR. Breach of Contract with Respect to Restaurant Franchise Agreements. 14 A.L.R.7th Art. 3 (2016).

CHAPTER 75

UNFAIR PRACTICES

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

SECTION.

SECTION.

4-75-101. Covenant not to compete agreements.

(a) A covenant not to compete agreement is enforceable if the agreement is ancillary to an employment relationship or part of an otherwise enforceable employment agreement or contract to the extent that:

(1) The employer has a protectable business interest; and

(2) The covenant not to compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.

(b) For the purposes of subsection (a) of this section, the protectable business interest of the employer includes the employer's:

(1) Trade secrets;

(2) Intellectual property;

(3) Customer lists;

(4) Goodwill with customers;

(5) Knowledge of his or her business practices;

(6) Methods;

(7) Profit margins;

(8) Costs;

(9) Other confidential business information that is confidential, proprietary, and increases in value from not being known by a competitor;

(10) Training and education of the employer's employees; and

(11) Other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness.

(c)(1) The lack of a specific or defined geographic descriptive restriction in a covenant not to compete agreement does not make the covenant not to compete agreement overly broad under subdivision (a)(2) of this section if the covenant not to compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.

(2) The reasonableness of a covenant not to compete agreement shall be determined after considering:

(A) The nature of the employer's protectable business interest;

(B) The geographic scope of the employer's business and whether or not a geographic limitation is feasible under the circumstances;

(C) Whether or not the restriction placed on the employee is limited to a specific group of customers or other individuals or entities associated with the employer's business; and

(D) The nature of the employer's business.

(d) A post-termination restriction of two (2) years is presumptively reasonable as to length of time under subdivision (a)(2) of this section

unless the facts and circumstances of a particular case clearly demonstrate that two (2) years is unreasonable compared to the employer's protectable business interest.

(e)(1) In a private court action, a court may award the employer damages for a breach of a covenant not to compete agreement, appropriate injunctive relief, or both, if appropriate.

(2) The immediate harm associated with the breach of a covenant not to compete agreement shall be considered irreparable to establish the appropriateness of a preliminary injunction.

(3) This subsection does not limit:

(A) Any other defense available to a party against a claim for preliminary injunctive relief; or

(B) An employer's right to monetary damages for breach of a covenant not to compete agreement.

(f)(1) If restrictions in a covenant not to compete agreement are found to be unreasonable and impose a greater restraint than is necessary to protect the protectable business interest of the employer under subdivision (a)(1) of this section, the court shall reform the covenant not to compete agreement to the extent necessary to:

(A) Cause the limitations contained in the covenant not to compete agreement to be reasonable; and

(B) Impose a restraint that is not greater than necessary to protect the protectable business interest.

(2) The court shall enforce the covenant not to compete agreement under the reformed terms and conditions.

(g) An employee's continued employment is sufficient consideration for a covenant not to compete agreement.

(h)(1) This subsection does not apply to a covenant not to compete agreement that is ancillary to other contractual relationships, including any type of agreement for the sale and purchase of a business, franchise agreement, and any other agreement not ancillary to an employment relationship or employment contract.

(2) Existing common law standards governing a covenant not to compete agreement outside the employment background shall remain in effect.

(i)(1) This section shall not apply to other types of agreements between employers and employees that do not concern competition or competitive work, including:

(A) Agreements not to solicit, recruit, or hire employees;

(B) Confidentiality agreements;

(C) Nondisclosure agreements; and

(D) The terms and conditions of an employment or employment agreement.

(2) Existing common law standards governing these types of agreements shall remain in effect.

(j) This section shall not:

(1) Be read to impair, limit, or change a party's protections and rights under the Arkansas Trade Secrets Act, § 4-75-601 et seq.; or

(2) Apply to a person holding a professional license under Arkansas Code Title 17, Subtitle 3.

History. Acts 2015, No. 921, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Jessica Weltge, Blue Penciling Noncompete Agreements in Arkansas and the Need for a Public Policy Exception, 2017 Ark. L. Notes 1954.

CASE NOTES

Analysis

Enforceability.
Temporary Restraining Order.

Enforceability.

Noncompetition clause was unenforceable as there was no restriction that prevented other employees from resigning and using some of the employer company's confidential information to start a digital printing business or work for another corrugated-box converter, and thus the company's information was not a protectable business interest that warranted enforcing the clause against the former employee office manager. The clause as applied to the facts presented was too broad to be enforced and any information obtained by the employee did not create an unfair competitive advantage. Lamb & Assocs. Packaging v. Best, 2020 Ark. App. 62, 595 S.W.3d 378 (2020).

Temporary Restraining Order.

Circuit court did not abuse its discretion in granting a temporary restraining order, pending trial, against defendant former employee that temporarily prohibited the former employee from having contact with the northwest Arkansas customers of plaintiff employer, an insulation and construction business, or from conveying disparaging communications. The court did not expressly apply this section, enacted in 2015, to the 2009 noncompete agreement, nor did it reject common law principles. Mounce v. Jeronimo Insulating, LLC, 2021 Ark. App. 195 (2021).

4-75-102. Private use of booking photograph — Definitions.

(a) As used in this section:

(1) "Booking photograph" means a photograph or image of an arrested person taken for identification purposes by an arresting law enforcement agency at the time the person is processed into jail; and

(2) "Publish-for-pay website" means a privately owned website that accepts, requests, or requires the payment of a fee or other consideration in order to remove a booking photograph from the website.

(b)(1) A person may request the removal of his or her booking photograph from a publish-for-pay website by submitting to the publish-for-pay website a written request to remove his or her booking photograph from the publish-for-pay website.

(2) The written request submitted under subdivision (b)(1) of this section shall include:

(A) The person's name and date of birth;

(B) The date of arrest; and

(C) The name of the arresting law enforcement agency.

(c)(1) A publish-for-pay website that displays booking photographs taken by an Arkansas law enforcement agency shall have displayed prominently on the home page of the publish-for-pay website the name,

mailing address, email address, and any other contact information for the owner or operator of the publish-for-pay website.

(2) A publish-for-pay website shall also provide, at no cost, for a readily accessible means by which a person may have verified by the owner or operator of the publish-for-pay website receipt of his or her written request submitted under subdivision (b)(1) of this section.

(3) The person responsible for removing the booking photograph of the person from the publish-for-pay website shall:

(A) Remove the booking photograph of the person from the publish-for-pay website within five (5) business days of receipt of a written request submitted under subdivision (b)(1) of this section; and

(B) Not require payment of a fee or other consideration for removing the booking photograph of the person from the publish-for-pay website.

(d) A publish-for-pay website that fails to remove the booking photograph of the person in accordance with this section is liable for civil penalties, including compensatory damages, attorney's fees, and punitive damages.

(e) The Attorney General may investigate violations of this section and may engage in litigation on behalf of a person making a written request under subdivision (b)(1) of this section, including an action for injunctive relief.

(f) A publish-for-pay website that is publicly accessible within this state is subject to this section.

History. Acts 2021, No. 450, § 1.

4-75-103. Posting incorrect background information about person — Definitions.

(a) As used in this section:

(1) "Background and criminal history information" means a record for an individual consisting of names, identification data, notations of arrests, detentions, any indictments, any filed criminal informations, or other formal criminal charges obtained from criminal justice agencies, including any dispositions of the charges, as well as notations on correctional supervision and release; and

(2)(A) "Commercial website" means a for-profit website that as part of its operations posts background information of a person.

(B) "Commercial website" does not include a:

(i) Legitimate news-gathering organization, publication, or aggregator; or

(ii) Consumer reporting agency as defined under § 4-93-102.

(b)(1) A person may request the removal of his or her background and criminal history information from a commercial website by submitting to the owner or operator of the commercial website a written request to remove his or her background and criminal history information from the commercial website.

(2) The written request submitted under subdivision (b)(1) of this section shall include the full name, date of birth, and state of residence of the person submitting the request for the removal of his or her background and criminal history information from the commercial website.

(c)(1) A commercial website that is publicly accessible within this state is subject to this section.

(2)(A) A commercial website that displays a person's background and criminal history information shall have displayed prominently on the home page of the commercial website the name, mailing address, email address, and any other contact information for the owner or operator of the commercial website.

(B) The owner or operator of the commercial website shall also, at no cost, provide for a readily accessible means by which a person may have verified by the owner or operator of the commercial website receipt of his or her request submitted under subdivision (b)(1) of this section.

(3) The person responsible for removing the background and criminal history information of the person from the commercial website shall:

(A) Remove the background and criminal history information of the arrested or convicted individual from the commercial website within five (5) business days of receipt of a request submitted under subdivision (b)(1) of this section; and

(B) Not require payment of a fee or other consideration for removing the background or criminal history information from the commercial website.

(d)(1) A person who is adversely affected, is denied employment, or is terminated from employment by an entity due in whole or in part to information provided by a commercial website that posts or posted the person's background and criminal history information may request in writing from the entity that took adverse action against, denied employment to, or terminated employment with the person the name and contact information of the commercial website that provided the person's background and criminal history information to the entity.

(2) The written request submitted under subdivision (d)(1) of this section shall be complied with no later than five (5) business days after receipt of the written request.

(e)(1) An owner or operator of a commercial website that knowingly fails or refuses to remove the background and criminal history information upon the person's request is liable to the person if the person shows by a preponderance of the evidence that the owner or operator of the commercial website knew or should have known that the background and criminal history information about the person was either incorrect or inaccurate.

(2) A civil action under this section is separate and distinct from a defamation or common law false light claim.

(3) Remedies available to the person bringing a civil action under this section include compensatory damages, attorney's fees, costs of litigation, and punitive damages.

(4) Punitive damages under this subsection shall be set at a minimum of one thousand dollars ($1,000) per day for each day that the owner or operator of a commercial website fails to remove the background or criminal history information after the five-day period described in subdivision (c)(3)(A) of this section.

(f) The owner or operator of a commercial website that displays a person's background and criminal history information may disclose only that background and criminal history information subject to disclosure under Arkansas law.

History. Acts 2021, No. 1045, § 1.

Subchapter 2 — Unfair Practices Act

SECTION.

4-75-211. Remedies — Witnesses and documents — Immunity.

(a) Any person, firm, private corporation, or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and, if injured thereby, for the recovery of damages.

(b)(1) If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this subchapter, it shall enjoin the defendant from a continuance thereof.

(2) It shall not be necessary that actual damages to the plaintiff be alleged or proved.

(3) In addition to injunctive relief, the plaintiff in the action shall be entitled to recover from the defendant three (3) times the amount of the actual damages, if any, sustained.

(c)(1) Any defendant in an action brought under the provisions of this section or any witness desired by the state may be required to testify under § 16-43-211 and as otherwise provided by law.

(2) In addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence.

(3) However, no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of §§ 4-75-204 and 4-75-207 — 4-75-210.

(d) The remedies prescribed in this subchapter are cumulative and in addition to the remedies prescribed in the Public Utilities Act, § 23-1-101 et seq., for discrimination by public utilities. If any conflict shall arise between this subchapter and the Public Utilities Act, § 23-1-101 et seq., the latter shall prevail.

History. Acts 1937, No. 253, §§ 10, 12; Pope's Dig., §§ 14320, 14322; A.S.A. 1947, §§ 70-310, 70-312; Acts 2013, No. 1148, § 2.

Subchapter 3 — Monopolies Generally

4-75-302. Monopolies unlawful.

RESEARCH REFERENCES

ALR. Construction and Application of Public Interest Requirement of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e)(1) (Tunney Act). 2 A.L.R. Fed. 3d Art. 4 (2015).

Subchapter 5 — Price Discrimination

SECTION.

Effective Dates. Acts 2017, No. 850, § 4: Apr. 3, 2017. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that discount and rebate programs are not available to all Arkansas consumers; that requiring discount and rebate programs to be available to all eligible consumers is important to the economic stimulation of the state; and that this act is necessary because Arkansas consumers will benefit from immediate access to discount and rebate programs. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

4-75-501. Manufactured products, coal oil, or dressed beef.

(a) It is unlawful for any person, company, corporation, or association engaged in the sale of any manufactured product, coal oil, or dressed beef, to:

(1) Sell any such manufactured product, coal oil, or dressed beef at a greater cash price at any place in this state than the person, company, corporation, or association sells the manufactured product, coal oil, or dressed beef at other points in this state, after making due allowance for difference in cost of carriage or other necessary cost; or

(2) Willfully refuse or fail to allow to any person, corporation, or company making purchases of the manufactured product, coal oil, or dressed beef all rebates and discounts that are granted by them to other purchasers, for cash, of like quantities of the manufactured product, coal oil, or dressed beef.

(b) This section does not apply to:

(1) A discount or rebate that is offered without charge to all purchasers on an equal basis, regardless of whether the purchaser chooses to accept or fulfill any of the nonmonetary conditions for receiving the discount or rebate; or

(2) A discount or rebate that is offered without charge to all members of a specified group, including without limitation senior citizens, students, or current or former members of the United States Armed Forces, if that group is not defined by race, color, sex, religion, or national origin of the purchaser.

(c)(1) A person, company, corporation, or association that violates this section shall forfeit not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) for each offense.

(2) Each unlawful sale or refusal or failure to allow the rebate or discount constitutes a separate offense.

(d)(1) The penalty in cases under this section is to be recovered by an action in the name of the person, company, corporation, or association damaged by the greater price or refusal of, or failure to allow, the rebate or discount or in the name of the state at the relation of any prosecuting attorney in this state.

(2)(A) The moneys collected under subdivision (d)(1) of this section shall be paid to the person, company, corporation, or association bringing the suit.

(B) If a suit is brought in the name of the state, one-fourth (¼) of the moneys collected shall be paid to the prosecuting attorney bringing the suit and three-fourths (¾) of the moneys collected shall be paid to the Public School Fund.

(3) An action or suit under this section may be brought in any county in which the offense was committed by action at law or suit in equity in the circuit court.

(4)(A) If a defendant is a person, corporation, or association, the service of summons upon the defendant in any county of this state shall be a sufficient service.

(B) If the defendant is a corporation, the service of summons upon any agent of the corporation in this state shall be a lawful service.

(5) Several offenses under this section may be joined in one (1) action or suit.

History. Acts 1903, No. 183, §§ 1-3, p. 349; C. & M. Dig., §§ 10324g-10324i; Pope's Dig., §§ 14304-14306; A.S.A. 1947, §§ 70-120 — 70-122; Acts 2017, No. 850, § 2.

A.C.R.C. Notes. Acts 2017, No. 850, § 1, provided: "Legislative findings and purpose.

"(a) The General Assembly finds that:

"(1) Arkansas consumers benefit from discount programs that retailers provide to consumers, such as coupons, loyalty programs, and discounts to members of certain groups, such as students, senior citizens, or members of the United States Armed Forces;

"(2) Arkansas retailers should have the right to design discount programs for their customers that offer discounts without charge on a nondiscriminatory basis to all members of the public or on a nondiscriminatory basis to all members of a particular group of consumers;

"(3) Arkansas retailers that have implemented such discount programs in the past should not be held liable for

penalties by those persons who chose not to participate in such programs or who were not eligible for such programs; and

"(4) It is in the best interests of the consumers of this state to allow retailers to design and implement discount programs for consumers without fear of liability.

"(b) The purpose of this act is to clarify that current Arkansas law does not prohibit a retailer from offering discounts without charge on a nondiscriminatory basis to all members of the public or on a nondiscriminatory basis to all members of a particular group of consumers."

Acts 2017, No. 850, § 3, provided: "RETROACTIVITY. This act is retroactive to January 1, 2012."

Amendments. The 2017 amendment inserted present (b) and redesignated the remaining subsections accordingly; rewrote and redesignated (d)(2) as (d)(2)(A) and (B); redesignated (d)(4) as (d)(4)(A) and (B); and made stylistic changes.

CASE NOTES

Analysis

Construction.
Failure to State Cause of Action.
Functional Availability.

Construction.

Focus of this section is not to bestow a right on the public, but to prevent injurious conduct. Rhodes v. Kroger Co., 2019 Ark. 174, 575 S.W.3d 387 (2019).

Acts 2017, No. 850, which amended this section, is substantive law in that it defines the parameters of this section in a way that was not previously set forth in the section; accordingly, it cannot be given retroactive application. Rhodes v. Kroger Co., 2019 Ark. 174, 575 S.W.3d 387 (2019).

Failure to State Cause of Action.

Customers failed to state a viable cause of action as a matter of law in their class action alleging that a grocery store company had violated this section through its reward card policies and procedures. Because the grocery store company consistently and uniformly offered its reward card to all customers, and it was only the customers' willful refusal to take part in the program that created the situation that was the primary focus of the complaint, the company did not violate this section by willfully refusing or failing to give the discounts afforded to card holders to all persons. Rhodes v. Kroger Co., 2019 Ark. 174, 575 S.W.3d 387 (2019).

Circuit court did not abuse its discretion in granting judgment on the pleadings on customers' claims concerning the grocery store company's senior-citizen discount because the focus of this section was on the conduct of the company, and the absence of any factual allegation regarding the mens rea was fatal to customers' cause of action; completely absent was any allegation that the customers asserted that they wished to receive the senior-citizen discount and that the company, through its employees or agents, willfully refused or failed to allow the discount. Rhodes v. Kroger Co., 2019 Ark. 174, 575 S.W.3d 387 (2019).

Functional Availability.

Rationale underlying the functional-availability doctrine, which provides that a plaintiff cannot recover for price discrimination when the plaintiff failed to take advantage of a price concession that was realistically and functionally available, is relevant to cases under this section; the functional-availability doctrine operates to keep the focus of an anti-price-discrimination statute on the actions of the seller, not the result that may be affected by the conduct of the buyer. Rhodes v. Kroger Co., 2019 Ark. 174, 575 S.W.3d 387 (2019).

Subchapter 6 — Theft of Trade Secrets

RESEARCH REFERENCES

ALR. Actions Under Defend Trade Secrets Act, 18 U.S.C. § 1836. 30 A.L.R. Fed. 3d Art. 9 (2018).

4-75-601. Definitions.

CASE NOTES

Analysis

Generally Known.
Information Protected.
Misappropriation.
Preemption.
Remedy.
Summary Judgment.
Trade Secret.

Generally Known.

Appellee claimed that the mere fact that appellant's formulas were capable of being reverse engineered made them generally known to, and readily ascertainable by, third persons; however, a formula or product may maintain its status as a trade secret, even though it can be reverse engineered, if the process of reverse engineering is too difficult or costly, and a fact question remained as to the cost or difficulty of reverse engineering the formulas; therefore, summary judgment was improper. Gibraltar Lubricating Servs. v. Pinnacle Resources, Inc., 2016 Ark. App. 156, 486 S.W.3d 224 (2016).

Appellee pointed to publications and patents attached to an expert's affidavit as evidence that the ingredients in appellant's formulas were generally known, but none of those items purported to contain the actual formulas of appellant, and there was testimony that appellant's lubricants had years of proven success and the formulation of the additive package was considered a trade secret; summary judgment was improper. Gibraltar Lubricating Servs. v. Pinnacle Resources, Inc., 2016 Ark. App. 156, 486 S.W.3d 224 (2016).

Information Protected.

Trial court properly granted a corporation a preliminary injunction to prevent an employee from using or disclosing trade secrets because it did not clearly err in finding that, as a director and an officer, the employee had a fiduciary duty to the corporation, and it did not abuse its discretion in finding the requisite irreparable harm and likelihood of success on the merits; the confidential information constituted trade secrets for the closely held corporation with few employees. LaPointe v. New Tech., Inc., 2014 Ark. App. 346, 437 S.W.3d 126 (2014).

Misappropriation.

It was error to dismiss a firm's trade secrets claim because (1) it was alleged that an employer used the firm's trade secrets acquired by the employer's employee's brother to compete with the firm, and (2) misappropriation included use of a trade secret acquired by another. Ballard Group, Inc. v. BP Lubricants USA, Inc., 2014 Ark. 276, 436 S.W.3d 445 (2014).

In a trade secrets action, brought by a foam producer against a former customer/competitor, after a consultant and manager left the producer and helped the competitor develop its own foam, there was a material factual dispute as to whether the competitor used "improper means" to acquire the producer's trade secrets; there was a reasonable inference that the competitor used information from the consultant and manager that it knew they had a duty not to disclose. 3A Composites USA, Inc. v. United Indus., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 122745 (W.D. Ark. Sept. 15, 2015).

Jury's award of $2,788,690 in damages for a retailer's misappropriation of trade secret source files was significantly reduced; although sufficient evidence at trial supported the jury's finding that the source files met the statutory definition of "trade secret" and that they were misappropriated, there was no evidence at trial that the source files actually played any role in any other firms' work for the retailer. Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262, 2018 U.S. Dist. LEXIS 55242 (W.D. Ark. Mar. 31, 2018), aff'd, 949 F.3d 1101 (8th Cir. 2020).

Preemption.

Not all claims asserted against a former employee were preempted by the Arkansas Trade Secrets Act; as to a tortious interference claim, an amended complaint alleged that, in addition to a theft of information, former clients were contacted to solicit their business. Moreover, an allegation that confidential information was deleted fell within the definition

of criminal trespass, which was not based on misappropriation of a trade secret. Jenkins v. APS Ins., LLC, 2013 Ark. App. 746, 431 S.W.3d 356 (2013).

Remedy.

In a case where it was alleged that an employee took electronic business data from an employer, the Arkansas Theft of Trade Secrets Act preempted a tort claim for the conversion of electronic data; the Act was the exclusive remedy for the alleged misappropriation of trade secrets. Infinity Headwear & Apparel, LLC v. Coughlin, 2014 Ark. App. 609, 447 S.W.3d 139 (2014).

Summary Judgment.

In this trade secrets case, the issue was whether appellant's formulas were readily ascertainable, such that they did not qualify as trade secrets; as the circuit court placed significant weight on appellee's expert's credibility, summary judgment was improperly granted. Gibraltar Lubricating Servs. v. Pinnacle Resources, Inc., 2016 Ark. App. 156, 486 S.W.3d 224 (2016).

Trade Secret.

There was insufficient evidence to support the jury's finding that a website contractor undertook reasonable efforts to maintain the secrecy of its Phased Release Support Technique, CMS Tweak Development Tool, and Zoning Tools as required by the definition of "trade secret" in this section. The jury's verdict was reversed as to those three alleged trade secrets. Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262, 2018 U.S. Dist. LEXIS 55242 (W.D. Ark. Mar. 31, 2018), aff'd, 949 F.3d 1101 (8th Cir. 2020).

Supplier did not undertake reasonable efforts to maintain the secrecy of three of the four alleged trade secrets from a buyer because the supplier never told the buyer that the technologies at issue were trade secrets and its broad declaration that everything except 13 specific templates was its exclusive property was insufficient to identify the techniques as trade secrets under Arkansas law. Walmart Inc. v. Cuker Interactive, LLC, 949 F.3d 1101 (8th Cir. 2020).

Where the buyer knew that the supplier's source files contained confidential materials and trade secrets, and the supplier took steps to protect them and did not acquiesce to the buyer's demands for them until compelled to do so, this was sufficient to identify the techniques as trade secrets under Arkansas law. Walmart Inc. v. Cuker Interactive, LLC, 949 F.3d 1101 (8th Cir. 2020).

4-75-602. Effect of subchapter on other law.

RESEARCH REFERENCES

ALR. Uniform Trade Secrets Act (UTSA) as Preempting Civil Action Not Sounding in Contract and Based on Misappropriation of Confidential Information Other than Trade Secret, and UTSA as Precluding Plaintiff's Assertion that Claim Does Not Constitute Trade Secret in Order to Circumvent Preemption Bar. 29 A.L.R.7th Art. 4 (2018).

CASE NOTES

ANALYSIS

Applicability.
Computer Crime.

Applicability.

In a trade secrets action, brought by a foam producer against a former customer/competitor, after a consultant and manager left the producer and helped the competitor develop its own foam, the producer's tortious interference and deceptive trade practices claims, which relied on the same acts that constituted alleged misappropriation, were preempted by the Arkansas Trade Secrets Act. 3A Composites USA, Inc. v. United Indus., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 122745 (W.D. Ark. Sept. 15, 2015).

In a trade secrets action, brought by a foam producer against a former customer/competitor, after a consultant and manager left the producer and helped the competitor develop its own foam, the pro-

ducer's breach of contract claims were not preempted by the Arkansas Trade Secrets Act, regardless of whether the claims were premised on alleged misappropriation. 3A Composites USA, Inc. v. United Indus., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 122745 (W.D. Ark. Sept. 15, 2015).

Computer Crime.

Not all claims asserted against a former employee were preempted by the Arkansas Trade Secrets Act; as to a tortious interference claim, an amended complaint alleged that, in addition to a theft of information, former clients were contacted to solicit their business. Moreover, an allegation that confidential information was deleted fell within the definition of criminal trespass, which was not based on misappropriation of a trade secret. Jenkins v. APS Ins., LLC, 2013 Ark. App. 746, 431 S.W.3d 356 (2013).

4-75-604. Injunctive relief.

CASE NOTES

Scope of Relief.

Where a buyer knew that the supplier's source files contained confidential materials and trade secrets, and the supplier took steps to protect them and where the record showed that the buyer misappropriated them, injunctive relief ordering the buyer to delete the supplier's source files was warranted under this section of the Arkansas Trade Secrets Act because the supplier testified that the files were a years-long compilation of technical know-how it continually drew from, and if allowed to keep the files in its possession, the buyer could use them, or share them, in connection with another project, and there was nothing to suggest that the files' usefulness to the buyer had expired or would expire. Walmart Inc. v. Cuker Interactive, LLC, 949 F.3d 1101 (8th Cir. 2020).

4-75-606. Damages.

RESEARCH REFERENCES

ALR. Proper Measure and Elements of Damages for Misappropriation of Trade Secret — Royalties. 28 A.L.R.7th Art. 6 (2018).

CASE NOTES

Proximate Cause.

In a trade secrets action, brought by a foam producer against a former customer/competitor, after a consultant and manager left the producer and helped the competitor develop its own foam, there were material factual disputes regarding misappropriation and the consultant's duty to preserve the trade secret; given the disputed material facts, reasonable minds could differ on the issue of proximate cause for purposes of damages. 3A Composites USA, Inc. v. United Indus., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 122745 (W.D. Ark. Sept. 15, 2015).

4-75-607. Attorney's fees.

CASE NOTES

Analysis

Appellate review.
Calculation of Fees.

Appellate review.

Because an employee voluntarily paid a corporation the amount of attorney's fees ordered, his appeal of the attorney's fees award was moot. LaPointe v. New Tech., Inc., 2014 Ark. App. 346, 437 S.W.3d 126 (2014).

Calculation of Fees.

Counter-claimant was entitled to attorney's fees under § 16-22-308 for the portion of a lawsuit primarily driven by the contract claims, as well as fees for work primarily driven by the trade secret claims, pursuant to this section. The trial court determined that the counter-claimant was entitled to $2,174,073.11 in attorney's fees. Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262, 2018 U.S. Dist. LEXIS 55242 (W.D. Ark. Mar. 31, 2018), aff'd, 949 F.3d 1101 (8th Cir. 2020).

Subchapter 7 — Unfair Cigarette Sales Act

Effective Dates. Acts 2015, No. 1235, § 34: Emergency clause failed to pass. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the state must be able to plan and give effective notice for the new comprehensive permits created by this act; that it is essential to the operation of Arkansas Tobacco Control and the tobacco, vapor product, and alternative nicotine product industry that this act be effective on the renewal date for permits issued by Arkansas Tobacco Control to ensure proper funding for the enforcement of the new regulations and requirements of this act; that a delay in the effectiveness of this act after the renewal date of permits and regulations issued by Arkansas Tobacco Control may cause irreparable harm upon the proper administration and provision of essential governmental programs; and that this act is necessary to ensure that the industry and the citizens of Arkansas are provided guidance regarding permits for vapor products and alternative nicotine products. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health, and safety shall become effective on May 1, 2015."

Acts 2019, No. 1071, § 31: Emergency clause failed to pass. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that renewals of permits under the Arkansas Tobacco Products Tax Act of 1977 are due on June 30 of each year; that changes in the permitting process should be effective before the date for renewals to ensure the efficient and effective administration of the Arkansas Tobacco Products Tax Act of 1977; and that this act is necessary because the implementation of the new permit types and permit fees included in the act requires that the effective date be before the due date for renewals. Therefore, an emergency is declared

to exist, and this act being necessary for the preservation of the public peace, health, and safety shall become effective on May 1, 2019."

4-75-702. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Basic cost of cigarettes" means whichever of the two (2) following amounts is lower, namely, the gross invoice cost of cigarettes to the wholesaler or retailer, as the case may be, or the lowest gross replacement cost of cigarettes to the wholesaler or retailer, as the case may be, within thirty (30) days prior to the date of sale, in the quantity last purchased, whether within or before the thirty-day period, plus the full face value of any stamps or any tax which may be required by any cigarette tax act of this state or political subdivision thereof, now in effect or hereafter enacted, if not already included in the gross invoice cost of cigarettes to the wholesaler or retailer, as the case may be;

(2) "Buying pool" means and includes any combination, corporation, association, affiliation, or group of retail dealers operating jointly in the purchase, sale, exchange, or barter of cigarettes, the profits of which accrue directly or indirectly to the retail dealers;

(3) "Cigarettes" means and includes any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, except tobacco;

(4)(A) "Cost to the retailer" means the basic cost of the cigarettes involved to the retailer plus the cost of doing business by the retailer as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.

(B) In the absence of the filing with the Arkansas Tobacco Control Board of proof satisfactory to the board of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the retailer shall be presumed to be nine and five-tenths percent (9.5%) of the basic cost of cigarettes to the retailer.

(C) In the case of any retail dealer who in connection with the retail dealer's purchase of any cigarettes shall receive not only the discounts ordinarily allowed upon purchases by a retail dealer but also in whole or in part the discounts ordinarily allowed upon purchases by a wholesale dealer, the cost of doing business by the retail dealer with respect to the said cigarettes shall be, in the absence of proof of a lesser or higher cost of doing business by the retail dealer, the sum of the cost of doing business by the retail dealer and, to the extent that he or she shall have received the full discounts ordinarily allowed to a wholesale dealer, the cost of doing business by a wholesale dealer as defined in subdivision (5)(B) of this section;

(5)(A) "Cost to wholesaler" means the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor costs, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.

(B) In the absence of the filing with the board of proof satisfactory to the board of a lesser or higher cost of doing business by the wholesale dealer making the sale, the cost of doing business by the wholesale dealer shall be presumed to be four percent (4%) of the basic cost of the cigarettes to the wholesale dealer;

(6) "Director" means the Director of Arkansas Tobacco Control;

(7) "Gross invoice cost" means the manufacturer's or wholesaler's price for the product sold as listed on the invoice to the wholesaler or retailer, as the case may be, before any deduction for allowances, whether manufacturer promotional allowances or otherwise, or for discounts of any kind;

(8) "Manufacturer promotional allowance" means any payment or compensation given by a manufacturer of cigarettes to wholesalers or to retailers to promote the sale of cigarettes and which the manufacturer requires the wholesaler to pass on to the retailer and the retailer to pass on to the retailer's customer;

(9) "Person" means and includes any individual, firm, association, company, partnership, corporation, joint-stock company, club, agency, syndicate, the State of Arkansas, county, municipal corporation, or other political subdivision of this state, receiver, trustee, fiduciary, or trade association;

(10) "Rebate" means a payment made by a seller of cigarettes to a purchaser of cigarettes after the sale that serves as a discount or return of part of an amount previously given in payment by the purchaser of cigarettes;

(11) "Retailer" means and includes any person who is engaged in this state in the business of selling cigarettes at retail and includes any group of persons, cooperative organizations, buying pools, and any other person or group of retailers purchasing cigarettes on a cooperative basis from licensed distributors or wholesalers. Any person placing a cigarette vending machine at, on, or in any premises shall be deemed to be a retailer for each such vending machine;

(12) "Sale" or "sell" means any transfer for a consideration, exchange, barter, gift, offer for sale, advertising for sale, soliciting an order for cigarettes, and distribution in any manner or by any means whatsoever;

(13) "Sell at retail", "sale at retail", or "retail sales" means and includes any sale for consumption or use made in the ordinary course of trade or usual conduct of the seller's business;

(14) "Sell at wholesale", "sale at wholesale", and "wholesale sales" mean and include any sale made in the ordinary course of trade or

usual conduct of the wholesaler's business to a retailer for the purpose of resale; and

(15) "Wholesaler" means and includes:

(A) Any person other than a buying pool as defined in subdivision (2) of this section, wherever resident or located, who brings or causes to be brought into this state unstamped cigarettes purchased directly from the manufacturer thereof and who maintains an established place of business where substantially all of the business is the sale of cigarettes and related merchandise at wholesale to cigarette licensees and where at all times a substantial stock of cigarettes and related merchandise is available for resale, if seventy-five percent (75%) thereof are sold to retailers or other wholesalers not connected with the wholesaler by reason of any business connection or otherwise;

(B) Any person retailing cigarettes to consumers, if at least seventy-five percent (75%) of his or her purchases are made directly from the manufacturers thereof;

(C) Any person in this state other than a buying pool, as defined in subdivision (2) of this section, who purchases cigarettes from any other person who purchases from a manufacturer, at least seventy-five percent (75%) of which are for purposes of resale to retailers in this state not connected with the wholesaler by reason of any business connection or otherwise and who maintains an established place of business where cigarettes and related merchandise are sold at wholesale to persons licensed under this subchapter, and where at all times a substantial stock of cigarettes and related merchandise is available to all retailers for resale; and

(D) Any person in this state who acquires cigarettes solely for the purpose of resale in cigarette vending machines, provided the person operates thirty (30) or more machines.

History. Acts 1951, No. 101, § 2; A.S.A. 1947, § 70-602; Acts 1999, No. 1237, § 1; 2003, No. 627, §§ 1-4; 2009, No. 785, § 1; 2019, No. 580, § 1; 2021, No. 942, § 1.

Amendments. The 2019 amendment substituted "nine and five-tenths percent (9.5%)" for "seven and one-half percent (7½%)" in (4)(B).

The 2021 amendment inserted the definition for "Rebate".

4-75-703. Sales excepted from subchapter.

(a) This subchapter does not apply to a sale at wholesale or a sale at retail made:

(1) In an isolated transaction and not in the usual course of business;

(2) Where cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in the cigarettes, and the advertising, offer to sell, or sale shall state the reason for the sale and the quantity of the cigarettes advertised, offered for sale, or to be sold;

(3) Where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or sale shall

state the reason for the sale and the quantity of the cigarettes advertised, offered for sale, or to be sold;

(4) Where cigarettes are sold upon the final liquidation of a business; or

(5) Where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

(b) For sales that are exempt under subsection (a) of this section, the seller shall:

(1) Notify Arkansas Tobacco Control of the sale at least one (1) business day before the sale occurs; and

(2) For sales that are below cost, submit the information required by the Director of Arkansas Tobacco Control on the form prescribed by the director.

History. Acts 1951, No. 101, § 6; A.S.A. 1947, § 70-606; Acts 2019, No. 1071, § 1.

Amendments. The 2019 amendment added the designation (a); substituted "does" for "shall" in the introductory language of (a); added (b); and made stylistic changes.

4-75-706. Director of Arkansas Tobacco Control — Powers and duties.

(a)(1) The Director of Arkansas Tobacco Control may prescribe, adopt, and enforce rules relating to the administration and enforcement of this subchapter.

(2)(A) The director may undertake and make or cause to be made one (1) or more cost surveys for the state or a trading area as he or she shall define, and when the cost survey is made by or approved by the director, it is permissible to use the cost survey as provided in § 4-75-711(b).

(B) The director may also investigate price fixing.

(3) The director may revoke or suspend the permit issued under this subchapter of any person who refuses or neglects to comply with this subchapter or any rule of the director prescribed under this subchapter.

(b) Whenever any person fails to comply with this subchapter or any rule of the director promulgated under this subchapter, the Arkansas Tobacco Control Board, upon a hearing, after giving the person ten (10) days' notice in writing specifying the time and place of the hearing and requiring the person to show cause why his or her permit should not be revoked, may revoke or suspend the permit held by the person.

(c) Any ruling, order, or decision of the board shall be subject to review, as provided by law, in the Pulaski County Circuit Court or any court of competent jurisdiction in the county in which the person affected resides or does business.

History. Acts 1951, No. 101, § 12; A.S.A. 1947, § 70-612; Acts 1999, No. 1237, § 2; 2009, No. 785, § 2; 2019, No. 1071, § 2.

Amendments. The 2019 amendment substituted "may" for "shall" in (a)(1); in (a)(2)(A), substituted "may" for "is empowered to and may from time to time"; substituted "may also" for "is also empowered to" in (a)(2)(B); substituted "permit" for

"license" in (a)(3), and twice in (b); substituted "Arkansas Tobacco Control Board" for "director" in (b); in (c), substituted "board" for "director", inserted "Pulaski County Circuit Court or", and added "or does business"; and made stylistic changes.

4-75-707. Permit requirement.

(a) A person shall not engage in or conduct the business of purchasing for resale or selling cigarettes without having first obtained the appropriate permit for that purpose.

(b) All permits for the purchasing for resale or the sale of cigarettes shall be issued by the Director of Arkansas Tobacco Control, who shall make rules respecting applications for and issuance of permits under this section.

(c) A wholesaler or retailer who sells or intends to sell cigarettes at one (1) or more places of business shall be required to obtain a separate permit for each place of business.

(d) A person permitted only as a wholesaler shall not operate as a retailer unless the appropriate permit is first secured, and a person permitted only as a retailer shall not operate as a wholesaler unless the appropriate permit is first secured.

History. Acts 1951, No. 101, § 13; A.S.A. 1947, § 70-613; Acts 1999, No. 1237, § 3; 2009, No. 785, § 3; 2019, No. 1071, § 2.

Amendments. The 2019 amendment substituted "Permit" for "License" in the section heading; substituted "permit" for "license" throughout the section; rewrote (b); substituted "permitted" for "licensed" twice in (d); and made stylistic changes.

4-75-708. Sales at less than cost, rebates, concessions, etc. — Penalty.

(a) It shall be unlawful for any wholesaler, retailer, or salesperson with intent to injure competitors or destroy or substantially lessen competition to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to the wholesaler or retailer, as the case may be.

(b)(1) It is unlawful for any wholesaler, retailer, or salesperson to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or to give a concession of any kind or nature whatsoever in connection with the sale of cigarettes with intent to injure competitors or destroy or substantially lessen competition.

(2) However, it is not unlawful under this section for a wholesaler to give a rebate if the rebate is paid by check or electronic direct deposit and does not result in a sale at less than the cost to the wholesaler according to § 4-75-702(5)(A), less discounts that are received by the wholesaler from the manufacturer.

(c) It shall be unlawful for any retail dealer to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler.

(d) Any wholesaler, retailer, or salesperson who violates this section shall be guilty of a violation and upon conviction shall be subject to a fine of not more than five hundred dollars ($500).

(e) The following shall be prima facie evidence of intent to injure competitors and destroy or substantially limit competition:

(1) The advertisement, offer for sale, or sale of cigarettes by any wholesaler, retailer, or salesperson at less than cost to him or her;

(2) Any offer of a rebate in price or the giving of a rebate in price or an offer of a concession or the giving of a concession of any kind in connection with the sale of cigarettes; or

(3) Inducing or attempting to induce or procuring or attempting to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer.

History. Acts 1951, No. 101, § 3; A.S.A. 1947, § 70-603; Acts 2003, No. 373, § 1; 2005, No. 1994, § 40; 2021, No. 942, § 2.

Amendments. The 2021 amendment added (b)(2); deleted (c)(2); and made stylistic changes.

4-75-714. [Repealed.]

Amendments. This section, concerning enforcement agents, was repealed by Acts 2015, No. 1235, § 32. The section was derived from Acts 2001, No. 1699, § 1; 2009, No. 785, § 5; 2013, No. 1273, § 1. For current law, see § 26-57-266.

Subchapter 10 — Foundation Repair Contracts Act

4-75-1001. Title.

This subchapter shall be known and may be cited as the "Foundation Repair Contracts Act".

History. Acts 2015, No. 687, § 1.

4-75-1002. Purpose.

The purpose of this subchapter is to ensure fair and reasonable regulation of foundation repair contracts to prevent misleading and deceptive business practices in the performance of a foundation repair contract.

History. Acts 2015, No. 687, § 1.

4-75-1003. Definitions.

As used in this subchapter:

(1) "Contractor" means a person or an entity that repairs or has repaired the foundation of a single-family dwelling;

(2) "Foundation repair contract" means a written contract between a homeowner and a contractor to repair the foundation of a single-family dwelling;

(3) "Homeowner" means the initial owner and any subsequent owner of a single-family dwelling; and

(4) "Single-family dwelling" means a dwelling constructed for habitation by one (1) to four (4) families.

History. Acts 2015, No. 687, § 1.

4-75-1004. Foundation repair contract requirements.

A foundation repair contract shall contain the:

(1) Legal description and street address of the single-family dwelling; and

(2) Names and addresses of the parties to the contract.

History. Acts 2015, No. 687, § 1.

4-75-1005. Enforceability.

A foundation repair contract is enforceable by a homeowner against a contractor for the time specified in the foundation repair contract.

History. Acts 2015, No. 687, § 1.

4-75-1006. Civil remedies.

If a homeowner successfully files suit to obtain a remedy authorized by this subchapter, the homeowner shall recover:

(1) The amount of the cost to repair the foundation, remediate any defects, and reconstruct the structural damage resulting from a defect in a single-family dwelling's foundation; and

(2) Court costs and a reasonable attorney's fee.

History. Acts 2015, No. 687, § 1.

Subchapter 11 — Frank Broyles Publicity Rights Protection Act of 2016

SECTION.
4-75-1113. Applicability.

A.C.R.C. Notes. Identical Acts 2016 (3rd Ex. Sess.), Nos. 8 and 9, § 2, provided: "SEVERABILITY CLAUSE. If any provision of this act or its application to any person or circumstance is held invalid, the invaliding does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

4-75-1101. Title.

This subchapter shall be known and may be cited as the "Frank Broyles Publicity Rights Protection Act of 2016".

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1102. Findings and legislative intent.

(a) The General Assembly finds that citizens of this state:

(1) Are renowned for their hard work and accomplishments in many areas that contribute to the public health, welfare, and pursuit of happiness;

(2) Often spend most of their lives developing and maintaining reputations of honesty and integrity;

(3) Have a vested interest in maintaining the memory of personal traits that characterize them and their accomplishments; and

(4) Should have the use of their names, voices, signatures, photographs, and likenesses protected for their benefit and the benefit of their families.

(b) It is the intent of the General Assembly by the enactment of this subchapter to:

(1) Protect the names, voices, signatures, photographs, and likenesses of the citizens of this state from exploitation and unauthorized commercial use without the consent of the citizen;

(2) Provide a method for the fair administration of the right to use the name, voice, signature, photograph, or likeness of a citizen; and

(3) Provide appropriate remedies for the exploitation and unauthorized commercial use of the name, voice, signature, photograph, or likeness of a citizen.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1103. Definitions.

As used in this subchapter:

(1)(A) "Commercial use" means the use of an individual's readily identifiable name, voice, signature, photograph, or likeness:

(i) For advertising, selling, or soliciting purchases of products, merchandise, goods, or services; or

(ii) On or in connection with products, merchandise, goods, or other commercial activity that is not exempt under this subchapter.

(B) "Commercial use" does not mean the use of an individual's name, voice, signature, photograph, or likeness to identify the individual for the purpose of:

(i) Data collection or data reporting and supplying the data collected or reported; or

(ii) Data processing, data matching, data distribution, or data licensing;

(2) "Individual" means a natural person, alive or dead;

(3) "Likeness" means a reproduction of the image of an individual by any means other than a photograph;

(4)(A) "Person" means an individual or entity.

(B) "Person" includes:

(i) A partnership, a corporation, a company, an association, or any other business entity;

(ii) A not-for-profit corporation or association;

(iii) An educational or religious institution;

(iv) A political party; and

(v) A community, civic, or other organization;

(5) "Photograph" means a reproduction of the image of an individual that readily identifies the individual, whether made by photography, videotape, live transmission, or other means; and

(6) "Successor in interest" means an owner or the beneficial owner of a property right provided by this subchapter under:

(A) A transfer, assignment, or license of the property right; or

(B) Section 4-75-1104(b)(3).

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1104. Property right in use of name, voice, signature, photograph, or likeness — Prior consent.

(a) An individual has a property right in the commercial use by any medium in any manner without the individual's prior consent of:

(1) The individual's name, voice, signature, photograph, or likeness; and

(2) Any combination of the individual's name, voice, signature, photograph, or likeness.

(b) The property right provided under subsection (a) of this section:

(1) Is freely transferable, assignable, licensable, and descendible, in whole or in part, by contract or by a trust, testamentary disposition, or other instrument executed before or after August 22, 2016;

(2) Does not expire upon the death of an individual, whether or not the rights were commercially used by the individual during the individual's lifetime; and

(3)(A) Upon the death of an individual, vests in the individual's executors, administrators, heirs, devisees, and assignees according to:

(i) The terms of a trust, testamentary, or other instrument under subdivision (b)(1) of this section; or

(ii) Except as provided in subdivision (b)(3)(B) of this section, if a testamentary instrument does not expressly provide for the transfer of a property right provided by subsection (a) of this section, the laws of this state governing intestate succession to personalty control.

(B) In the absence of an express transfer in a testamentary instrument of the rights of an individual in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the individual's assets is effective to transfer the rights recognized under this section in accordance with the terms of the provision.

(c) Subject to the terms of a transfer, assignment, or license of a property right provided by this section, the consent required by subsection (a) of this section shall be exercised by:

(1) The individual during the lifetime of the individual;

(2) A person or persons to whom all or part of the right of consent has been transferred, assigned, or licensed; or

(3) After the death of an individual, as provided by § 4-75-1105.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1105. Exercise of rights after death.

(a) Subject to the terms of a transfer, assignment, or license of property rights under § 4-75-1104, after the death of an individual, consent to the use of the individual's name, voice, signature, photograph, or likeness shall be granted by no less than fifty and one-thousandths percent (50.001%) of the owners of the right to use the name, voice, signature, photograph, or likeness of the individual under § 4-75-1104(b)(3).

(b) Compensation or other remuneration received under subsection (a) of this section for the use of the name, voice, signature, photograph, or likeness of the individual shall be shared by all owners of the right to use the name, voice, signature, photograph, or likeness of the individual according to each owner's respective ownership interest.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1106. Registration.

(a) A successor in interest shall register a claim of property rights under this subchapter in the manner provided by this section.

(b) Unless a claim of property rights under this subchapter is registered under this section, a successor in interest shall not recover damages from a person or obtain any other legal or equitable remedy on the claim for a commercial use prohibited by this subchapter unless the person knew of the claim of the successor in interest before the person undertook efforts or expense to make the commercial use.

(c)(1) A successor in interest shall register the claim with the Secretary of State:

(A) On a form prescribed by the Secretary of State; and

(B) By paying a filing fee prescribed by the Secretary of State not to exceed twenty-five dollars ($25.00).

(2) The form shall:

(A) Be verified under oath;

(B) Include the name and, if applicable, date of death of the individual; and

(C) Include the name and address of the claimant, the basis of the claim, and the property rights claimed.

(d)(1) Upon receipt of the claim, the Secretary of State shall file and post the form along with the entire registry of persons claiming to be a successor in interest of a decedent on the website of the Secretary of State.

(2) The Secretary of State shall microfilm or otherwise reproduce the filing or form and destroy the original filing or form.

(3) Under this section, the microfilm or other reproduction of the filing or form is:

(A) Admissible in any court of law; and

(B) A matter of public record.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1107. Exclusive rights — Expiration.

Subject to a transfer, an assignment, or a licensing agreement, the property rights provided by this subchapter are exclusive to:

(1) An individual during the individual's lifetime; and

(2) The executors, administrators, heirs, devisees, and assignees of the individual for fifty (50) years after the individual's death.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1108. Unauthorized commercial use.

(a) Except as provided in § 4-75-1110, a person who commercially uses the name, voice, signature, photograph, or likeness of an indi-

vidual is liable to the holder of the property right provided by this subchapter for damages and disgorgement of profits, funds, goods, or services if the commercial use was not authorized under § 4-75-1104(c).

(b) If a minor is the holder of the property right, the parent or legal guardian may consent on the minor's behalf.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1109. Civil actions — Damages.

(a) An aggrieved party may file a civil action in the county where:

(1) One (1) or more defendants reside; or

(2) A violation of this subchapter occurred.

(b) Upon finding a violation of this subchapter, the court may issue an injunction to prevent or restrain the unauthorized commercial use of the name, voice, signature, photograph, or likeness of the individual.

(c)(1) The holder of the property right under this subchapter is entitled to recover for the unauthorized commercial use of the property right by seeking both:

(A) The actual damages the holder of the property right has suffered as a result of a commercial use of the property right; and

(B) Any profits that are attributable to the commercial use.

(2) Profits that are attributable to the commercial use shall not be considered in computing the actual damages.

(3) The existence or nonexistence of profits from the unauthorized commercial use shall not be a criterion for determining liability.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1110. Exempt use — Commercial use.

(a)(1) It is not a violation of this subchapter if the name, voice, signature, photograph, or likeness of an individual is used:

(A) In connection with a news, public affairs, or sports broadcast, including the promotion of and advertising for a sports broadcast, an account of public interest, or a political campaign;

(B) In:

(i) A play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work;

(ii) A work of political, public interest, or newsworthy value, including a comment, criticism, parody, satire, or a transformative creation of a work of authorship; or

(iii) An advertisement or commercial announcement for any of the works described in subdivision (a)(1)(A) of this section or this subdivision (a)(1)(B);

(C) In a photograph or likeness where the individual appears as a member of the public, an attendee of a photographed event, or in a public place, and the individual is not named;

(D) By an institution of higher education or by a nonprofit organization, club, or supporting foundation that is authorized by the institution of higher education and established solely to advance the purposes of the institution of higher education if:

(i) The use is for educational purposes or to promote the institution of higher education and its educational, athletic, or other institutional objectives; and

(ii) The individual is or was affiliated with the institution, including without limitation as a:

(a) Student or member of the faculty or staff;

(b) Donor or campus visitor; or

(c) Contractor, subcontractor, or employee;

(E) By any person practicing the profession of photography or his or her representative:

(i) To exhibit and display photographs in a personal portfolio through physical media or digital media unless the exhibit and display are continued by the person practicing the profession of photography after written notice objecting to the exhibit and display has been given by the individual or by his or her representative;

(ii) To distribute photographs for license and sale or other transfer to third parties or to promote or advertise such activities; and

(iii) To provide yearbooks to an educational institution or photographs for school publications; or

(F) By a service provider of a system or network if the service provider:

(i) Does not have actual knowledge that a photograph or likeness on the system or network is in violation of this subchapter; or

(ii) In the absence of such actual knowledge, is not aware of facts or circumstances from which a violation of this subchapter is apparent.

(2) The use of the name, voice, signature, photograph, or likeness of the individual within a work that is protected under subdivision (a)(1)(B) of this section is not an exempt use protected by subdivision (a)(1) of this section if the claimant proves that the use is so directly connected with a product, article of merchandise, good, or service other than the work itself as to constitute an act of advertising, selling, or soliciting purchases of the product, article of merchandise, good, or service by the individual without the prior consent required by this subchapter.

(b)(1) The commercial use of the name, voice, signature, photograph, or likeness of the individual in a commercial medium does not constitute a commercial use for purposes of advertising or solicitation if the material containing the commercial use is authorized by the individual for commercial sponsorship or paid advertising.

(2) It is a question of fact as to whether or not the commercial use of the name, voice, signature, photograph, or likeness of an individual is

so directly connected with the commercial sponsorship or paid advertising as to constitute an authorized use for purposes of advertising or solicitation.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1111. Exclusive remedies.

(a) Remedies granted by this subchapter shall constitute the exclusive basis for asserting a claim for the unauthorized commercial use of the name, voice, signature, photograph, or likeness of an individual.

(b) Except as provided in this subchapter, a right of publicity in the use of the name, voice, signature, photograph, or likeness of an individual does not exist.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1112. Construction.

(a) This subchapter:

(1) Shall be liberally construed to accomplish its intent and purposes; and

(2) Does not render invalid or unenforceable a contract or license entered into before or after August 22, 2016, by an individual during his or her lifetime by which the individual transferred, assigned, or licensed all or part of the right to use his or her name, voice, signature, photograph, or likeness.

(b) The property rights granted by this subchapter are not considered intellectual property for purposes of 47 U.S.C. § 230.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

4-75-1113. Applicability.

(a) The property rights granted by this subchapter vest with respect to an individual on August 22, 2016.

(b) This subchapter applies only to individuals maintaining a domicile or residence in the State of Arkansas on or after August 22, 2016.

History. Acts 2016 (3rd Ex. Sess.), No. 8, § 1; 2016 (3rd Ex. Sess.), No. 9, § 1.

Subchapter 12 — Asphalt Roof Shingles Express Warranty Act

4-75-1201. Title.

This subchapter shall be known and may be cited as the "Asphalt Roof Shingles Express Warranty Act".

History. Acts 2017, No. 487, § 1.

4-75-1202. Purpose.

The purpose of this subchapter is to ensure that the express warranty provided by a manufacturer against defective asphalt roof shingles is available to a homeowner and any subsequent homeowner to prevent misleading and deceptive business practices in the sale of asphalt roof shingles.

History. Acts 2017, No. 487, § 1.

4-75-1203. Definitions.

As used in this subchapter:

(1) "Asphalt roof shingles" means a roof-covering material or product that is installed on a roof of a single-family dwelling;

(2) "Homeowner" means the initial owner and any subsequent owner of a single-family dwelling;

(3) "Manufacturer" means an entity that is engaged in the manufacturing of asphalt roof shingles; and

(4) "Single-family dwelling" means a dwelling constructed for habitation by one to four (1-4) families.

History. Acts 2017, No. 487, § 1.

4-75-1204. Enforceability.

A manufacturer's express warranty against defective asphalt roof shingles is enforceable by a homeowner against a manufacturer for the time specified in the express warranty as provided by the manufacturer.

History. Acts 2017, No. 487, § 1.

Subchapter 13 — Arkansas Student-Athlete Publicity Rights Act [Effective January 1, 2022]

SECTION.

Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1301. Title. [Effective January 1, 2022.]

This subchapter shall be known and may be cited as the "Arkansas Student-Athlete Publicity Rights Act".

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1302. Definitions. [Effective January 1, 2022.]

As used in this subchapter:

(1)(A) "Commercial use" means the use of an individual's readily identifiable name, voice, signature, photograph, or likeness:

(i) For advertising, selling, or soliciting purchases of products, merchandise, goods, or services; or

(ii) On or in connection with products, merchandise, goods, or other commercial activity that is not exempt under this subchapter.

(B) "Commercial use" does not include the use of an individual's name, voice, signature, photograph, or likeness to identify the individual for the purpose of:

(i) Data collection or data reporting and supplying the data collected or reported; or

(ii) Data processing, data matching, data distribution, or data licensing;

(2) "Image" means a picture or other recognizable visual representation of a student-athlete;

(3) "Likeness" means a reproduction of an image of an individual by any means other than a photograph;

(4) "Name" means:

(A) The first, middle, or last name of a student-athlete; or

(B) When used in a context that reasonably identifies a student-athlete with particularity:

(i) The initials of the student-athlete; or

(ii) The nickname of the student-athlete;

(5) "Photograph" means a reproduction of an image of an individual that readily identifies the individual, whether made by photography, videotape, live transmission, or other means;

(6) "Publicity right" means a right that is recognized under state or federal law that permits an individual to control and profit from commercial use of the individual's name, image, voice, signature, photograph, or likeness;

(7)(A) "Student-athlete" means an individual enrolled at an institution of higher education who is eligible to engage in any varsity intercollegiate athletics program at the institution.

(B) "Student-athlete" does not include an individual who is permanently ineligible to participate in a particular varsity intercollegiate athletics program for the purposes of the particular varsity intercollegiate athletics program; and

(8)(A) "Third-party licensee" means an individual or entity that licenses, secures, or uses the publicity rights of a student-athlete or that provides compensation in any form to a current or prospective student-athlete, or anyone on behalf of the student-athlete, in exchange for the student-athlete's using, displaying, referring to, mentioning, endorsing, advertising, selling, marketing, promoting, or soliciting the purchase of a product, merchandise, good, service, organization, or business.

(B) "Third-party licensee" does not include an athletic association, athletic conference, institution of higher education, or nonprofit organization, club, or supporting foundation that is authorized by an institution of higher education and established solely to advance the purposes of the institution of higher education.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1303. Right to compensation. [Effective January 1, 2022.]

(a) Except as prohibited in this subchapter, a student-athlete may enter into a contract and receive compensation for the commercial use of the student-athlete's publicity rights.

(b) Except as provided in this subchapter or applicable federal law, an institution of higher education shall not uphold any rule, requirement, standard, or other limitation of an athletic association or athletic conference that prevents a student-athlete from earning compensation for the commercial use of the student-athlete's publicity rights.

(c) Earning compensation for the commercial use of a student-athlete's publicity rights shall not affect the student-athlete's scholarship eligibility.

(d) An athletic association, athletic conference, or any other organization with authority over varsity intercollegiate athletics shall not:

(1) Prevent a student-athlete from receiving compensation for the commercial use of the student-athlete's publicity rights under this subchapter;

(2) Penalize a student-athlete for receiving compensation for the commercial use of the student-athlete's publicity rights under this subchapter; or

(3) Prevent an institution of higher education from participating in varsity intercollegiate athletics, or otherwise penalize an institution of higher education, as a result of a student-athlete's receipt of compensation under this subchapter.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1304. Conflicts. [Effective January 1, 2022.]

(a) A third-party licensee or student-athlete shall not enter into a contract for the commercial use of the student-athlete's publicity rights if the contract:

(1) Requires the student-athlete to endorse, use, solicit, sell, market, advertise, promote, refer to, mention, display, or otherwise promote the name, image, logo, product, service, purpose, campaign, business, digital or physical address, or location of any third-party licensee or commercial entity during a varsity intercollegiate athletic practice, competition, or other activity;

(2) Conflicts with a term or condition of a contract, policy, rule, regulation, or standard of the student-athlete's enrolled institution of higher education; or

(3) Involves the student-athlete's performance or lack of performance in athletic competition.

(b) A contract in violation of this subchapter is void and unenforceable.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1305. Representation. [Effective January 1, 2022.]

(a) An agent, athlete agent, financial advisor, or attorney who is providing professional representation of a student-athlete shall be licensed, as applicable, in this state.

(b) An institution of higher education, athletic association, athletic conference, or other organization with authority over varsity intercollegiate athletics shall not prevent a student-athlete from participating in a varsity intercollegiate sport, or otherwise penalize a student-athlete, for obtaining professional representation in connection with an opportunity to earn compensation for the commercial use of the student-athlete's publicity rights.

(c) A student-athlete may rescind a publicity rights contract with a third-party licensee or a contract for professional representation related to publicity rights without being held liable for breach of contract and with no obligation to return payments received before giving notice of rescission if the student-athlete is no longer:

(1) Enrolled at an institution of higher education;

(2) Eligible to engage in any varsity intercollegiate athletics program at an institution of higher education; or

(3) Participating in varsity intercollegiate athletics at an institution of higher education.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1306. Disclosure. [Effective January 1, 2022.]

(a)(1) A student-athlete who enters into a contract related to the commercial use of the student-athlete's publicity rights shall disclose to a designated official of the student-athlete's institution of higher education the existence of the contract, including the contract terms, conditions, parties, and compensation amounts.

(2) The disclosure described in subdivision (a)(1) of this section shall be made within a time period and in a manner designated by the institution of higher education.

(b)(1) A professional representative of a student-athlete for a contractual or legal matter regarding the student-athlete's opportunity to earn compensation for the commercial use of the student-athlete's publicity rights shall disclose to a designated official of the student-athlete's institution of higher education the relationship between the professional representative and the student-athlete and the existence of the contract, including without limitation the contract terms, conditions, parties, and compensation amounts.

(2) The disclosure described in subdivision (b)(1) of this section shall be made within a time period and in a manner designated by the institution of higher education.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1307. Scope. [Effective January 1, 2022.]

(a) This subchapter does not:

(1) Allow a student-athlete to seek or obtain compensation for any use of the student-athlete's publicity rights stated in § 4-75-1110;

(2) Require an institution of higher education, athletic association, conference, or other organization with authority over varsity intercollegiate athletics to identify, create, facilitate, negotiate, or otherwise enable opportunities for a student-athlete to earn compensation for the commercial use of the student-athlete's publicity rights;

(3) Authorize a student-athlete to use the name, nicknames, trademarks, service marks, landmarks, facilities, trade dress, uniforms, songs, mascots, logos, images, symbols, or other intellectual property, whether registered or not, of an institution of higher education, athletic association, conference, or other organization with authority over varsity intercollegiate athletics;

(4) Limit the right of an institution of higher education to establish and enforce:

(A) Academic standards, requirements, regulations or obligations for its students;

(B) Team rules of conduct or other rules of conduct;

(C) Standards or policies regarding the governance or operation of or participation in varsity intercollegiate athletics; or

(D) Disciplinary rules generally applicable to all students of the institution of higher education;

(5) Authorize any prospective student-athlete who may attend an institution of higher education, any third-party licensee, or anyone acting on behalf of the prospective student-athlete to negotiate or receive compensation for the commercial use of the prospective student-athlete's publicity rights before the student-athlete's enrollment in an institution of higher education or practice or competition in varsity intercollegiate athletics; or

(6) Render student-athletes employees of the institution of higher education based on participation in varsity intercollegiate athletic competition.

(b) Notwithstanding any other provision of this subchapter, a student-athlete participating in varsity intercollegiate athletics is prohibited from earning compensation as a result of the commercial use of the student-athlete's publicity rights in connection with any person or entity related to or associated with the development, promotion, production, distribution, wholesaling, or retailing of:

(1) Adult entertainment, sexually suggestive products, or sex-oriented products, services, conduct, imagery, or inferences;

(2) Alcohol products;

(3) A casino and gambling, including without limitation sports betting and betting in connection with a video game or online game, or on a mobile device;

(4) Tobacco, marijuana, or electronic smoking products and devices;

(5) Pharmaceuticals;

(6) Any dangerous or controlled substance;

(7) Drug paraphernalia;

(8) Weapons, including without limitation firearms and ammunition; or

(9) Any product, substance, or method that is prohibited in competition by an athletic association, athletic conference, or other organization governing varsity intercollegiate athletic competition.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

4-75-1308. Civil remedy. [Effective January 1, 2022.]

(a)(1) An institution of higher education or a student-athlete as defined in § 4-75-1302 has a cause of action for damages against an athlete agent or third-party licensee if the institution of higher education or student-athlete is adversely affected by an act or omission of the athlete agent, third-party licensee, or anyone acting on behalf of the athlete agent or third-party licensee in violation of this subchapter.

(2) An institution of higher education or student-athlete is adversely affected by an act or omission of an athlete agent, third-party licensee, or anyone acting on behalf of the athlete agent or third-party licensee, only if, because of the act or omission, the institution of higher education or student-athlete:

(A) Is suspended or disqualified from participating in an intercollegiate sport; or

(B) Suffers financial damage.

(b) A student-athlete has a cause of action under this section only if the student-athlete was enrolled in an institution of higher education at the time of the act or omission.

(c) In an action under this section, a prevailing plaintiff may recover punitive damages, reasonable attorney's fees and costs, and any other reasonable litigation expenses.

History. Acts 2021, No. 810, § 1.
Effective Dates. Acts 2021, No. 810, § 2: Jan. 1, 2022.

Subchapter 14 — Arkansas Fair Food Delivery Act [Effective January 1, 2022]

Effective Dates. Acts 2021, No. 969, § 2: Jan. 1, 2022.

4-75-1401. Title. [Effective January 1, 2022.]

This subchapter shall be known and may be cited as the "Arkansas Fair Food Delivery Act".

History. Acts 2021, No. 969, § 1.
Effective Dates. Acts 2021, No. 969, § 2: Jan. 1, 2022.

4-75-1402. Definitions. [Effective January 1, 2022.]

As used in this subchapter:

(1) "Food delivery platform" means an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility and to

arrange for the delivery of the food order from the food facility to the consumer; and

(2) "Food facility" means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level.

History. Acts 2021, No. 969, § 1.
Effective Dates. Acts 2021, No. 969, § 2: Jan. 1, 2022.

4-75-1403. Food delivery platform — Prohibitions. [Effective January 1, 2022.]

A food delivery platform shall not arrange for the delivery of a food order from a food facility without first entering into an agreement with the food facility expressly authorizing the food delivery platform to take food orders and deliver food orders prepared by the food facility to consumers.

History. Acts 2021, No. 969, § 1.
Effective Dates. Acts 2021, No. 969, § 2: Jan. 1, 2022.

4-75-1404. Remedies. [Effective January 1, 2022.]

(a) A food facility may bring a civil action to enjoin a violation of this subchapter.

(b)(1) If a court finds that a food delivery platform has acted in violation of this subchapter, the court shall issue an injunction.

(2) In addition to the remedy in subdivision (b)(1) of this section, the court may:

(A) Require the violator to pay to the injured party all profits derived from or damages resulting from the wrongful act; and

(B) Order that the wrongful act be terminated.

(c) If the court finds that the food delivery platform committed the wrongful act in bad faith by not obtaining an agreement or written consent, the court shall:

(1) Enter judgment against the food delivery platform as follows:

(A) For a first violation, a fine of not less than five hundred dollars ($500);

(B) For a second violation, a fine of not less than one thousand dollars ($1,000); and

(C) For a third or subsequent violation, a fine of not less than one thousand five hundred dollars ($1,500); and

(2) Award reasonable attorney's fees to the food facility.

(d) The Attorney General or any prosecuting attorney of the state may bring an action against the food delivery platform for a violation of this subchapter.

History. Acts 2021, No. 969, § 1.
Effective Dates. Acts 2021, No. 969, § 2: Jan. 1, 2022.

CHAPTER 76

COPYRIGHT ROYALTY COLLECTION

4-76-107. Civil remedies — Injunction.

RESEARCH REFERENCES

ALR. Actual Registration or Application as Constituting Condition Precedent to Copyright Infringement Action Under § 411(a) of Copyright Act (17 U.S.C. § 411(a)). 30 A.L.R. Fed. 3d Art. 4 (2018).

SUBTITLE 7. CONSUMER PROTECTION

CHAPTER 86

GENERAL PROVISIONS

SECTION.

Effective Dates. Acts 2015, No. 1169, § 3: Emergency clause failed to pass. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that agriculture is an essential element of Arkansas's economy; that protecting the members of the agricultural community in Arkansas is in the best interests of the state; that the failure of some contractors to notify growers in advance that additional investments may be required under a production contract has resulted in some growers being forced to close their businesses; and that this act is immediately necessary because the unexpected closure of these businesses is harmful to the state's agricultural community and overall economy. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2021, No. 1104, § 2: Jan. 1, 2022.

4-86-102. [Transferred.]

Publisher's Notes. Former § 4-86-102 was renumbered as § 16-116-101 in 2016 by the Arkansas Code Revision Commission.

4-86-106. Automatic renewal of professional home security contracts prohibited.

RESEARCH REFERENCES

ALR. Consumer Protection: Automatic Renewal Clauses. 32 A.L.R.7th Art. 5 (2018).

4-86-109. Automatic lease agreement renewal — Notice required — Definition.

(a) For purposes of this section, "automatic lease renewal" means a provision in a written lease of personal property that the lease is automatically renewed for an additional term at the end of the initial lease agreement term or at the end of any renewal lease term unless the lessee gives written notice to the lessor not to renew the lease agreement.

(b) Except as provided in subsection (c) of this section, a lessor of personal property under a written lease agreement that contains an automatic lease renewal shall provide to a lessee:

(1) Written notice of the automatic renewal at least thirty (30) days before the date the cancellation of the renewal of the lease agreement is due by the lessee;

(2) The identification of the lessor on communications between the lessee and lessor, including monthly statements;

(3) A copy of the original lease agreement on request; and

(4) The full purchase price, the interest rate for the lease, the monthly payment, and the total payoff amount for the personal property in the written lease agreement.

(c) If the lessor fails to provide the notice and information required under subsection (b) of this section, the automatic lease agreement renewal is voidable at the option of the lessee.

(d) This section does not apply to lease agreements with a term of less than one (1) year.

History. Acts 2013, No. 1320, § 1.

RESEARCH REFERENCES

ALR. Consumer Protection: Automatic Renewal Clauses. 32 A.L.R.7th Art. 5 (2018).

4-86-110. Additional investment for production contracts.

(a) For purposes of this section, "production contract" means the same as defined in § 2-32-201.

(b) A lender or loan originator shall provide the following notice in boldface in or attached as a separate document to a commercial loan agreement if the borrower is obtaining financing relating to a produc-

tion contract: "NOTICE: The Borrower may be required to make additional investments to comply with the related production contract before the term of this agreement is complete. The Lender is not obligated to make any additional loans to the Borrower if additional investments are required to comply with the related production contract."

History. Acts 2015, No. 1169, § 2.

4-86-111. Pharmaceutical manufacturer discounts for insulin — Pharmaceutical manufacturer — Definition. [Effective January 1, 2022.]

(a)(1) As used in this section, "pharmaceutical manufacturer discount" means a discount offered by a pharmaceutical manufacturer or an affiliate of a pharmaceutical manufacturer, directly or indirectly, on a prescription drug.

(2) "Pharmaceutical manufacturer discount" includes without limitation:

(A) Coupon cards;

(B) Price concessions;

(C) Rebates;

(D) Manufacturer administrative fees;

(E) Inflation payments;

(F) Product discounts or fees related to procurement of prescription drug inventories;

(G) Care management fees; and

(H) Any other fees that are paid by a pharmaceutical manufacturer to secure placement on a drug formulary or to otherwise move market share of a prescription drug that is intended to reduce the net cost to a patient, consumer, or healthcare payor.

(b)(1) Except as provided in subdivision (b)(2) of this section, a pharmaceutical manufacturer or an affiliate of a pharmaceutical manufacturer is prohibited from providing a pharmaceutical manufacturer discount on any insulin product.

(2) A pharmaceutical manufacturer discount may be offered for an insulin product if the pharmaceutical manufacturer discount is:

(A) Provided directly to the end user in the form of a pharmaceutical manufacturer discount coupon card; and

(B) Adjudicated in real time using the National Council for Prescription Drug Programs claims transmission standard.

(c) The Attorney General may:

(1) Investigate potential violations of this section; and

(2) Bring suit against a pharmaceutical manufacturer in violation of this section.

(d) This section does not apply to the Arkansas Medicaid Program.

History. Acts 2021, No. 1104, § 1.
Effective Dates. Acts 2021, No. 1104, § 2: Jan. 1, 2022.

CHAPTER 87

ARKANSAS EQUAL CONSUMER CREDIT ACT

4-87-104. Discrimination based on sex or marital status unlawful.

RESEARCH REFERENCES

ALR. Discrimination Against Credit Applicant on Basis of Marital Status Under Equal Credit Opportunity Act (15 U.S.C. §§ 1691 et seq.). 18 A.L.R. Fed. 3d Art. 5 (2017).

CHAPTER 88

DECEPTIVE TRADE PRACTICES

SUBCHAPTER.
1. General Provisions.
2. Enhanced Penalties When Elder Persons or Persons With Disabilities Are Targeted.
3. Protection of Consumers from Price Gouging and Unfair Pricing Practices During and Shortly After a State of Emergency.
4. "Slamming" in the Telecommunications Industry.
8. Fair Disclosure of State Funded Payments for Pharmacists' Services Act.
9. Unfair Practices Related to Residential Real Estate Repair Contracts.
10. Patient Rights Regarding Payment for Pharmacists Services Act.

RESEARCH REFERENCES

ALR. Extension of Credit Under Consumer Credit Protection Act Provisions (18 U.S.C. §§ 891 to 894) Prohibiting Extortionate Credit Transactions. 35 A.L.R. Fed. 3d Art. 2 (2018).

CASE NOTES

Class Certification.

Class certification against nursing homes met Ark. R. Civ. P. 23 predominance because common issues existed as to (1) a duty to provide proper staffing under an admission agreement and § 20-10-1201, (2) liability under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., and (3) whether statutory and contractual duties were met. GGNSC Arkadelphia, LLC v. Lamb, 2015 Ark. 253, 465 S.W.3d 826 (2015).

Subchapter 1 — General Provisions

SECTION.
4-88-101. Applicability of chapter.

SECTION.
4-88-102. Definitions.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev.
Terrence Cain, Essay: The (Un?) Constitutionality of Compelling Non-Immunized Testimony in Deceptive Trade Practices Investigations Conducted by the Attorney General of the State of Arkansas, 37 U. Ark. Little Rock L. Rev. 91 (2014).

4-88-101. Applicability of chapter.

This chapter does not apply to:

(1) Advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission;

(2) Broadcasters, printers, publishers, and other persons engaging in the dissemination of information who do not have actual knowledge of the intent, design, purpose, or deceptive nature of the advertising or practice;

(3) Actions or transactions specifically permitted under laws administered by the Insurance Commissioner, the Securities Commissioner, the State Highway Commission, the Bank Commissioner, or other regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests the Attorney General to implement the powers of this chapter; or

(4) Actions or transactions of a public utility which have been authorized by the Arkansas Public Service Commission, a municipal authority, the Federal Energy Regulatory Commission, the Federal Communications Commission, or other regulatory body or officer acting under statutory authority of the United States.

History. Acts 1971, No. 92, § 13; A.S.A. 1947, § 70-913; Acts 1991, No. 1177, § 3; 1995, No. 836, § 6; 2017, No. 986, § 1.

Amendments. The 2017 amendment inserted "specifically" preceding "permitted" in (3).

RESEARCH REFERENCES

ALR. Fraudulent Representations Concerning Price, Discount, Condition, Quality, Availability or Shipping Costs of Consumer Goods and Services Sold on Internet. 38 A.L.R.7th Art. 4 (2019).

Ark. L. Rev. Nathan Price Chaney, The

Arkansas Deceptive Trade Practices Act: The Arkansas Supreme Court Should Adopt the Specific-Conduct Rule, 67 Ark. L. Rev. 299 (2014).

CASE NOTES

ANALYSIS

Applicability.
Elements of Claim.
Practice of Law.
Preemption.

Applicability.

Disappointed loan applicant had no contract or tort claim against either the lender or the loan broker, because no contract was ever formed and neither the lender or the broker owed the applicant a duty of care, and the applicant could not recover under the Deceptive Trade Practices Act, pursuant to this section, because both the broker and lender were regulated by the state and the federal government. Arloe Designs, LLC v. Arkansas Capital Corp., 2014 Ark. 21, 431 S.W.3d 277 (2014).

District court did not err in dismissing plaintiff's claim under the Arkansas Deceptive Trade Practices Act (ADTPA), as plaintiff failed to establish that defendants' acts of conversion and fraud were consumer-oriented or impacted consumers in any way. The ADTPA does not apply to deception and fraud claims regarding business between a manufacturer and its distributor when consumers are not deceived or defrauded. Stonebridge Collection, Inc. v. Carmichael, 791 F.3d 811 (8th Cir. 2015).

Arkansas Deceptive Trade Practices Act's safe-harbor provision in subdivision (3) of this section is to be applied according to the specific-conduct rule, meaning that it precludes claims only when the actions or transactions at issue have been specifically permitted or authorized under laws administered by a state or federal regulatory body or officer. Air Evac EMS, Inc. v. USAble Mut. Ins. Co., 2017 Ark. 368, 533 S.W.3d 572 (2017) (answering certified questions from federal district court).

The specific-conduct rule should be applied to the safe-harbor provision in subdivision (3) of this section, because (1) the Arkansas Deceptive Trade Practices Act is to be liberally construed, and the general-activity rule would undermine the Act's purpose by exempting virtually all conduct, since virtually all conduct is regulated in some way, such that the general-activity rule would essentially read the Act out of existence, and (2) the General Assembly's 2017 amendment of the provision to add "specifically" before "permitted" showed an intent to follow the specific-conduct rule. Air Evac EMS, Inc. v. USAble Mut. Ins. Co., 2017 Ark. 368, 533 S.W.3d 572 (2017) (answering certified questions from federal district court).

Because the matter was before the Supreme Court on an interlocutory appeal of a permanent injunction, it did not consider the merits of a competitor's claim that a corporation violated the Arkansas Deceptive Trade Practices Act (ADTPA) because the ADTPA does not provide for a private cause of action seeking injunctive relief. Apprentice Info. Sys. v. DataScout, LLC, 2018 Ark. 146, 544 S.W.3d 39 (2018).

Trial court properly ruled that an air ambulance service's claims under the Arkansas Deceptive Trade Practices Act against a plan insurer were precluded by the act's safe-harbor provision in subdivision (3) of this section because the service's claims were based on the terms and rates of the insurer's plans that were approved by the Insurance Commissioner under § 23-79-109(a)(1)(A)(i). Air Evac EMS, Inc. v. USAble Mut. Ins. Co., 931 F.3d 647 (8th Cir. 2019).

Elements of Claim.

Because a breach of contract, in and of itself, was not tortious, the supplier had no cognizable tortious interference or Arkansas Deceptive Trade Practices Act claims. B & B Hardware, Inc. v. Fastenal Co., 688 F.3d 917 (8th Cir. 2012).

Practice of Law.

Because a law firm and its attorneys were attorneys engaged in the practice of law at the time of their alleged collection of amounts in excess of those set forth in § 4-60-103 by a holder of a dishonored check, the Arkansas Deceptive Trade Practices Act (ADTPA), §§ 4-88-101 to 4-88-804, had no applicability to their

actions. The law firm was engaged in the practice of law by engaging in settlement negotiations for its clients. Bennett & Deloney, P.C. v. State ex rel. McDaniel, 2012 Ark. 119, 388 S.W.3d 12 (2012).

Preemption.

Arkansas Deceptive Trade Practices Act claim in a putative class action against an air ambulance service could not impose a state statutory price disclosure obligation beyond the scope of any agreement the air ambulance service had with its passenger because such disclosure obviously related to both price and service and was preempted by the Airline Deregulation Act, 49 U.S.C. § 41713. Ferrell v. Air EVAC EMS, Inc., 900 F.3d 602 (8th Cir. 2018).

4-88-102. Definitions.

As used in this subchapter:

(1) "Caller identification service" means a service offered by a telecommunications provider that provides caller identification information to a device capable of displaying the information;

(2) "Charitable organization" means any benevolent, philanthropic, patriotic, civic, or eleemosynary person;

(3) "Contribution" means the promise or grant of any money or property of any kind or value;

(4) "Goods" means any tangible property, coupons, or certificates, whether bought or leased;

(5) "Person" means an individual, organization, group, association, partnership, corporation, or any combination of them;

(6) "Promotion" means, for each charitable organization represented, each and every fundraising drive or campaign for which contributions are solicited. Similar or identical promotions on behalf of different charitable organizations constitute separate and distinct promotions;

(7) "Services" means work, labor, or other things purchased that do not have physical characteristics;

(8) "Solicitation" means each request for a contribution; and

(9) "Actual financial loss" means an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods or services and the actual market value of the goods or services provided to a person.

History. Acts 1991, No. 1177, § 3; 1993, No. 587, § 1; 2003, No. 1465, § 1; 2017, No. 986, § 2.

Amendments. The 2017 amendment added the definition for "Actual financial loss".

RESEARCH REFERENCES

Ark. L. Rev. Margaret E. Rushing, Comment: Deceptively Simple: The Arkansas Deceptive Trade Practices Act, 71 Ark. L. Rev. 1033 (2019).

4-88-105. Consumer Protection Division.

(a) There is created within the office of the Attorney General a Consumer Protection Division.

(b) The director of the division shall be known as the "Consumer Counsel of Arkansas" and shall be appointed by the Attorney General

who may also appoint such assistants, investigators, and professional and clerical staff as are necessary for the efficient operation of the division.

(c) The division shall represent and protect the state, its subdivisions, the legitimate business community, and the general public as consumers.

(d) The division shall have the following functions, powers, and duties:

(1) To serve as a central coordinating agency and clearinghouse for receiving complaints of illegal, fraudulent, or deceptive practices;

(2) To assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of the consumer public;

(3) To conduct investigations, research, studies, and analyses of matters, to issue reports, and take appropriate action affecting the interests of consumers, which may include the referral of complaints to state and local departments or agencies charged with enforcement of consumer laws, or to private organizations and agencies; however, the division may retain jurisdiction over such matters until resolved;

(4) To promote consumer education and to undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, advertisement, and sale of consumer goods and services, encouraging and supporting activities directed toward these objectives by the Better Business Bureau, consumer organizations, and other associations of like nature;

(5) To investigate violations of laws enacted and rules promulgated for the purpose of consumer protection, and to study the operation of such laws and rules and to recommend to the General Assembly needed changes in law in the consumer's interest; and

(6) To enforce the provisions of this chapter and to perform such other functions as may be incidental to the powers and duties set forth in this chapter.

(e) The expenses of the division shall be paid from funds provided for that purpose by law, including without limitation:

(1) Funds made available by the state, a state agency, or a state political subdivision;

(2) Funds made available by the United States Government or a federal agency; or

(3)(A) Funds deposited into a Consumer Education and Enforcement Account, managed by the division, from settlements or judgments in favor of the state related to a lawsuit or assurance of voluntary compliance in which the state was a party.

(B) The account shall not carry a balance greater than one million dollars ($1,000,000), and the funds in the account shall be used in a manner determined by the office of the Attorney General, including without limitation:

(i) Litigation support;

(ii) Expert witness fees;
(iii) Court filing fees;
(iv) Process server fees;
(v) Witness fees;
(vi) Court costs;
(vii) Court reporter fees;
(viii) Attorney and staff training;
(ix) Travel expenses;
(x) Consumer education;
(xi) Office expenses and improvements; and
(xii) Investigation expenses.

(f)(1) As used in this section, "state agency" includes without limitation:

(A) A state agency, office, or department;
(B) A board or commission; and
(C) A public college or university.

(2) When a settlement is agreed to or a judgment is entered in a lawsuit in which the state is a party receiving all or part of the settlement or judgment, the Attorney General shall distribute the funds in the following manner:

(A) Restitution to Arkansas consumers or state agencies, or for other purposes, as designated by the court order or settlement agreement;

(B) Designation of cash funds to a state agency having a nexus to the underlying litigation;

(C) Payment of attorney's fees or civil penalties under § 4-88-113(a)(1), § 4-88-113(c), or § 4-88-113(e); or

(D) Payment into the account, as authorized by this section.

(3)(A) Funds to be distributed as described in subdivisions (f)(2)(B)-(D) of this section shall be distributed in the manner prescribed by this section within one hundred twenty (120) days of the receipt of the funds.

(B) Restitution funds shall be distributed to Arkansas consumers as soon as is practicable and in accordance with any applicable court order.

(4)(A) The office of the Attorney General shall on a quarterly basis provide to the Legislative Council or Joint Budget Committee a report of all cash funds received from court orders or settlement agreements.

(B) The report shall include:

(i) The case name of the court order or settlement agreement;

(ii) The amount of funds received by the office of the Attorney General for each court order or settlement agreement; and

(iii)*(a)* A plan for disbursement of the funds.

(b) If cash funds received from a court order or settlement agreement are expended for any purpose, including consumer education and enforcement activities, the report must itemize specific activities subject to the exclusions provided in § 4-88-111 and § 25-1-403(1)(B).

(c) The report shall also itemize the specific consumer education and enforcement activities funded for the office of the Attorney General.

(C) If funds received from a court order or settlement agreement are given to a specific entity by the office of the Attorney General, the report shall include:

(i)*(a)* Whether or not the court order or settlement agreement directed funds to be given to a specific entity.

(b) If the court order or settlement agreement directs funds to a specific entity, the office of the Attorney General shall provide a summary of input regarding the drafting of the court order or settlement agreement.

(c) If the office of the Attorney General receives funds from a court order or settlement agreement that does not require disbursement of funds to a specific entity, the office of the Attorney General shall report a rationale for disbursing funds to a specific entity; and

(ii) A report of current balances of all unappropriated cash fund holdings received by court order or settlement agreement by the office of the Attorney General.

(D) The quarterly reports shall be provided no later than the fifteenth day of the month immediately following the end of each quarter.

History. Acts 1971, No. 92, §§ 1, 2, 12; A.S.A. 1947, §§ 70-901, 70-902, 70-912; Acts 1991, No. 1177, § 3; 2013, No. 763, §§ 1, 2; 2015, No. 1160, § 2; 2019, No. 315, § 129.

Amendments. The 2019 amendment, in (d)(5), deleted "and regulations" following "rules" and substituted "such laws and rules" for "such laws, rules, and regulations".

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Eric B. Estes, Undercover Investigations and Government Lawyers, 37 U. Ark. Little Rock L. Rev. 285 (2015).

4-88-107. Deceptive and unconscionable trade practices generally.

(a) Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to, the following:

(1) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model;

(2) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(3) Advertising the goods or services with the intent not to sell them as advertised;

(4) Refusal of a retailer to deliver to a customer purchasing any electronic or mechanical apparatus the record of warranty and state-

ment of service availability which the manufacturer includes in the original carton or container of the product or the refusal to make available on request information relating thereto;

(5) The employment of bait-and-switch advertising consisting of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell, evidenced by:

(A) A refusal to show or a disparagement of the advertised product;

(B) The requirement of a tie-in sale or other undisclosed conditions precedent to the purchase;

(C) A demonstration of a defective product; or

(D) Other acts demonstrating an intent not to sell the advertised product or services;

(6) Knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages;

(7) Making a false representation that contributions solicited for charitable purposes shall be spent in a specific manner or for specified purposes;

(8) Knowingly taking advantage of a consumer who is reasonably unable to protect his or her interest because of:

(A) Physical infirmity;

(B) Ignorance;

(C) Illiteracy;

(D) Inability to understand the language of the agreement; or

(E) A similar factor;

(9) The offering for sale, assembly, or drafting of any trust document, including a living trust, by a nonlawyer, excluding the marketing, assembly, and funding by bank trust departments and trust companies;

(10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade;

(11)(A) Displaying or causing to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(B) Subdivision (a)(11)(A) of this section does not apply to the transmission of a caller identification service by a telecommunications provider that complies with § 23-17-122; and

(12) Knowingly facilitating, assisting, intermediating, or in any way aiding the operation or continuance of an act or practice that is in violation of this chapter.

(b) The deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

History. Acts 1971, No. 92, § 6; A.S.A. 1947, § 70-906; Acts 1991, No. 1177, § 3; 1993, No. 587, § 2; 1995, No. 1306, § 1; 2003, No. 1465, § 2; 2019, No. 677, § 2; 2021, No. 1015, § 2.

A.C.R.C. Notes. Acts 2019, No. 677, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) The citizens of this state are being negatively affected by illegal robocalls from telemarketers and from others seek-

ing to perpetrate scams on them;

"(2) While these illegal robocalls are frustrating for most, the robocalls are costly and dangerous for far too many Arkansans;

"(3) An alarming number of illegal robocalls originate from scammers using automatic telephone dialing systems to send out thousands of phone calls per minute with fictitious or misleading names or telephone numbers displaying on unsuspecting consumers' telephone caller identification service;

"(4) These scammers are engaging in insidious schemes and targeting seniors and other vulnerable groups by soliciting personal information such as credit or debit card information and Social security numbers;

"(5) Displaying fictitious or misleading names or telephone numbers, or 'spoofing', is the predominant means by which a robocaller protects their identities and entices consumers to answer the telephone; and

"(6) Spoofing is the gateway for illegal robocalls and scams.

"(b) It is the intent of the General Assembly:

"(1) To protect the citizens of this state from being spoofed by receiving illegal robocalls from telemarketers and from others seeking to perpetrate scams on unsuspecting or vulnerable citizens;

"(2) To provide the citizens of this state who use a caller identification service with accurate information about the identities and locations of callers;

"(3) To encourage telecommunications providers to swiftly implement technologies that will allow telecommunications providers to identify and stop illegal calling practices; and

"(4) That this act be construed as broadly as possible to ensure that the citizens of this state are protected from the negative impact of illegal robocalls and to ensure that scammers and complicit telecommunications providers are held criminally accountable."

Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

"(4) The economic effects of romance scams, government imposter scams, and sweepstakes scams is devastating to older adults or vulnerable adults.

"(b) It is the intent of the General Assembly:

"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

Amendments. The 2019 amendment added "that complies with § 23-17-122" in (a)(11)(B).

The 2021 amendment added (a)(12).

RESEARCH REFERENCES

ALR. Fraudulent Representations Concerning Price, Discount, Condition, Quality, Availability or Shipping Costs of Consumer Goods and Services Sold on Internet. 38 A.L.R.7th Art. 4 (2019).

Ark. L. Rev. Nathan Price Chaney, The Arkansas Deceptive Trade Practices Act: The Arkansas Supreme Court Should Adopt the Specific-Conduct Rule, 67 Ark. L. Rev. 299 (2014).

CASE NOTES

ANALYSIS

Applicability.
Class Action.
Elements of Claim.
Misrepresentation.
Scope.
Unconscionable Conduct.

Applicability.

Circuit court properly ruled that the Arkansas Deceptive Trade Practices Act was not applicable to appellant's case because appellant failed to assert that appellee engaged in any type of consumer-oriented act or practice that caused damages. Skalla v. Canepari, 2013 Ark. 415, 430 S.W.3d 72 (2013).

Arkansas Deceptive Trade Practices Act (ADTPA) claim failed because ADTPA did not apply to practice of law in undertaking debt collections. Humes v. LVNV Funding, LLC (In re Humes), 496 B.R. 557 (Bankr. E.D. Ark. 2013).

District court did not err in dismissing plaintiff's claim under the Arkansas Deceptive Trade Practices Act (ADTPA), as plaintiff failed to establish that defendants' acts of conversion and fraud were consumer-oriented or impacted consumers in any way. The ADTPA does not apply to deception and fraud claims regarding business between a manufacturer and its distributor when consumers are not deceived or defrauded. Stonebridge Collection, Inc. v. Carmichael, 791 F.3d 811 (8th Cir. 2015).

Collection and dissemination of license-plate data prohibited by the Automatic License Plate Reader System Act, § 12-12-1801 et seq., was not consumer-oriented, and thus did not constitute an unconscionable act subject to the Attorney General's enforcement authority under the Deceptive Trade Practices Act, § 4-88-101 et seq. Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952 (8th Cir. 2015).

Trial court abused its discretion in dismissing the doctor's Arkansas Deceptive Trade Practices Act claim because the operator's alleged conduct took advantage of physically infirm customers and was an unconscionable business practice; the doctor alleged actual damages sufficient to withstand a motion to dismiss because he was allegedly terminated due to his resistance to take part in the operator's scheme to increase revenue. Hamby v. Health Mgmt. Assocs., 2015 Ark. App. 298, 462 S.W.3d 346 (2015).

In a foreclosure action, in which borrowers asserted a counterclaim under the Arkansas Deceptive Trade Practices Act based on subdivisions (a)(8)(A) and (a)(10) of this section, there was no showing that the lender co-trustees, who were the parents of one of the borrowers, were in the business; commerce, or trade of making loans; instead, there was testimony that the borrowers would not qualify for a conventional loan and this was simply a case of parents helping their child, and the circuit court found that borrowers were not damaged. Parker v. Parker, 2017 Ark. App. 242, 520 S.W.3d 693 (2017).

Class Action.

Class of consumers alleging a manufacturer falsely advertised light cigarettes as safer than regular cigarettes was properly certified because individual issues did not predominate, as (1) the key inquiry under § 4-88-101 et seq., was the manufacturer's deception, and (2) a bifurcated approach could be used to address individual causation and damages issues. Philip Morris Cos. v. Miner, 2015 Ark. 73, 462 S.W.3d 313 (2015).

When consumers claimed a manufacturer falsely advertised that light cigarettes were safer than regular cigarettes, a trial court sufficiently found a class was ascertainable because (1) the court's class definition referred to objective criteria, (2) the court did not have to separately find ascertainability, and (3) consumers did not have to provide receipts for purchases to show class membership. Philip Morris Cos. v. Miner, 2015 Ark. 73, 462 S.W.3d 313 (2015).

Class action was a superior method of adjudicating the claims of a class of consumers that a manufacturer falsely advertised that light cigarettes were safer than regular cigarettes because (1) the manufacturer would not have to litigate multiple lawsuits, and (2) the overarching issue of the manufacturer's misrepresentation could be conveniently determined. Philip Morris Cos. v. Miner, 2015 Ark. 73, 462 S.W.3d 313 (2015).

Elements of Claim.

Circuit court erred in finding that a corporation violated the Arkansas Deceptive Trade Practices Act (ADTPA), § 4-88-101 et seq., because there was simply no "consumer-oriented act" as required for a cause of action under the ADTPA; the circuit court clearly erred in finding that the plaintiff competitor was a consumer for purposes of the ADTPA because the corporation and the competitor were opponents in the market of selling counties' public data. Apprentice Info. Sys. v. DataScout, LLC, 2018 Ark. 149, 544 S.W.3d 536 (2018).

Misrepresentation.

Appellant claimed the trial court erred in dismissing her claim for violation of the Arkansas Deceptive Trade Practices Act, but that claim required proof of a misrepresentation; the salesman's statement that the vehicle was in good condition was subject to interpretation by the individual and was more of an opinion than a misrepresentation. Epley v. John Gibson Auto Sales, 2016 Ark. App. 540 (2016).

Scope.

In Preston v. Stoops, 373 Ark. 591, 285 S.W.3d 606 (2008), the Arkansas Supreme Court dismissed the client's claim against the attorney because it found that the Arkansas Deceptive Trade Practices Act (ADTPA), § 4-88-101 et seq., did not apply to the practice of law; the basis for this holding was that the Arkansas General Assembly did not have the authority to create a law that would control the practice of law. However, that same protective rationale did not apply to the creditor here; it was a separate entity apart from the firm it hired to collect the debt, and Preston did not shield it from debtor's ADTPA cause of action. Humes v. LVNV Funding, L.L.C. (In re Humes), 468 B.R. 346 (Bankr. E.D. Ark. 2011).

Specific prohibitions enumerated in subdivisions (a)(1)-(9) of this section each involve false representation, fraud, or the improper use of economic leverage in a trade transaction; thus, the catch-all provision for "any other unconscionable, false, or deceptive act or practice in business, commerce, or trade" in subdivision (a)(10) must be interpreted to reach similar instances of false representation, fraud, or the improper use of economic leverage in a trade transaction. Universal Coops., Inc. v. AAC Flying Serv., 710 F.3d 790 (8th Cir. 2013).

Herbicide distributor's complaint alleged that the crop dusters applied the herbicide in contravention of the label instructions, during inappropriate weather conditions, and without maintaining required records (but it did not allege that these actions included conduct in the nature of an improper use of economic leverage in a trade transaction); the alleged conduct simply failed to fit within the scope of the unconscionable trade practices prohibited by the Arkansas Deceptive Trade Practices Act. Universal Coops., Inc. v. AAC Flying Serv., 710 F.3d 790 (8th Cir. 2013).

Unconscionable Conduct.

Circuit clerk's Arkansas Deceptive Trade Practices Act claim did not state a claim because Arkansas law did not impose a duty on assignees of real estate mortgages to record those assignments, and the court could not see how failing to record was false or unconscionable when no such duty existed. Brown v. Mortg. Elec. Registration Sys., 738 F.3d 926 (8th Cir. 2013).

4-88-108. Concealment, suppression, or omission of material facts.

(a) When utilized in connection with the sale or advertisement of any goods, services, or charitable solicitation, the following is unlawful:

(1) The act, use, or employment by a person of any deception, fraud, or false pretense;

(2) The concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission;

(3) Displaying or causing to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's caller identification service; or

(4) Using a third party to display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's caller identification service.

(b) Subdivision (a)(3) of this section does not apply to the transmission of a caller identification service by a telecommunications provider that complies with § 23-17-122.

History. Acts 1971, No. 92, § 4; A.S.A. 1947, § 70-904; Acts 1991, No. 1177, § 3; 1995, No. 836, § 2; 2019, No. 677, § 3.

A.C.R.C. Notes. Acts 2019, No. 677, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) The citizens of this state are being negatively affected by illegal robocalls from telemarketers and from others seeking to perpetrate scams on them;

"(2) While these illegal robocalls are frustrating for most, the robocalls are costly and dangerous for far too many Arkansans;

"(3) An alarming number of illegal robocalls originate from scammers using automatic telephone dialing systems to send out thousands of phone calls per minute with fictitious or misleading names or telephone numbers displaying on unsuspecting consumers' telephone caller identification service;

"(4) These scammers are engaging in insidious schemes and targeting seniors and other vulnerable groups by soliciting personal information such as credit or debit card information and Social security numbers;

"(5) Displaying fictitious or misleading names or telephone numbers, or 'spoofing', is the predominant means by which a robocaller protects their identities and entices consumers to answer the telephone; and

"(6) Spoofing is the gateway for illegal robocalls and scams.

"(b) It is the intent of the General Assembly:

"(1) To protect the citizens of this state from being spoofed by receiving illegal robocalls from telemarketers and from others seeking to perpetrate scams on unsuspecting or vulnerable citizens;

"(2) To provide the citizens of this state who use a caller identification service with accurate information about the identities and locations of callers;

"(3) To encourage telecommunications providers to swiftly implement technologies that will allow telecommunications providers to identify and stop illegal calling practices; and

"(4) That this act be construed as broadly as possible to ensure that the citizens of this state are protected from the negative impact of illegal robocalls and to ensure that scammers and complicit telecommunications providers are held criminally accountable."

Amendments. The 2019 amendment added designation (a); added (a)(3), (a)(4), and (b); and made stylistic changes.

RESEARCH REFERENCES

ALR. Fraudulent Representations Concerning Price, Discount, Condition, Quality, Availability or Shipping Costs of Consumer Goods and Services Sold on Internet. 38 A.L.R.7th Art. 4 (2019).

CASE NOTES

Odometer.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble dam-

ages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

4-88-109. Prohibition of pyramid promotional schemes — Definitions.

(a) A person who promotes any pyramid promotional scheme engages in an unlawful practice.

(b) As used in this section:

(1) "Bona fide inventory repurchase program" means a program through which an entity repurchases from an independent salesperson current and marketable inventory in possession of the independent salesperson, upon request and upon commercially reasonable terms, when the independent salesperson's business relationship with the entity is terminated;

(2) "Commercially reasonable terms" means the repurchase of current and marketable inventory within twelve (12) months after the date of purchase at not less than ninety percent (90%) of the original net cost, less appropriate set-offs and legal claims, if any;

(3) "Compensation" means a payment of any money, a thing of value, or financial benefit conferred in return for inducing another person to participate in a pyramid promotional scheme;

(4)(A) "Consideration" means the payment of cash or the purchase of goods, services, or intangible property.

(B) "Consideration" does not include:

(i) The purchase of goods or services furnished at cost to be used in making sales and not for resale;

(ii) Time and effort spent in pursuit of sales or recruiting activities; or

(iii) Payment for sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(5) "Inventory" means goods and services, including company-produced promotional materials, sales aids, and sales kits that an entity requires independent salespersons to purchase;

(6) "Inventory loading" means the requirement or encouragement by a plan or operation that its independent salesperson purchase inventory in an amount that exceeds the amount that the independent salesperson can expect to resell for ultimate consumption or to use or consume in a reasonable time period, or both;

(7) "Person" means an individual, corporation, trust, estate, partnership, unincorporated association, or any other legal or commercial entity;

(8) "Promote" means to contrive, prepare, establish, plan, operate, advertise, or otherwise induce or attempt to induce another person to participate in a pyramid promotional scheme; and

(9)(A) "Pyramid promotional scheme" means any plan or operation through which a person gives consideration for the opportunity to receive compensation primarily from the introduction of other per-

sons into the plan or operation rather than from the sale and consumption of goods, services, or intangible property by a participant or other persons introduced into the plan or operation.

(B) "Pyramid promotional scheme" includes any plan or operation that limits the number of participants either expressly or by the application of conditions affecting the eligibility of a person to receive compensation under the plan or operation, and includes any plan or operation under which a person, on giving any consideration, obtains any goods, services, or intangible property in addition to the right to receive compensation.

(c)(1) This section does not prohibit a plan or operation, or define a plan or operation as a pyramid promotional scheme, if all of the following occur:

(A) The participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods, services, or intangible property by participants for personal use, consumption, or resale;

(B) The plan or operation does not require inventory loading; and

(C) The plan or operation implements a bona fide inventory repurchase program.

(2)(A) An entity shall clearly describe a bona fide inventory repurchase program in an entity's recruiting literature, sales manual, or contracts with independent salespersons.

(B) The recruiting literature, sales manual, or contracts shall disclose any inventory that is not eligible for repurchase under the bona fide inventory repurchase program.

(3) A bona fide inventory repurchase program is not required to apply to inventory that is no longer within the inventory's commercially reasonable use or shelf life period or has been used or opened.

(d) Before an independent salesperson of an entity purchases inventory, the entity shall clearly document the inventory that is excluded from the bona fide inventory repurchase program as "seasonal", "discontinued", or "special promotion products" and indicate that the inventory is not subject to the bona fide inventory repurchase program.

History. Acts 1971, No. 92, § 5; A.S.A. 1947, § 70-905; Acts 1991, No. 1177, § 3; 2019, No. 340, § 1.

Amendments. The 2019 amendment substituted "Prohibition of pyramid promotional schemes" for Pyramiding devices" in the section heading; and rewrote the section.

RESEARCH REFERENCES

ALR. Judicial Remedies for Proceeds and Funds from Ponzi Schemes. 100 A.L.R.6th 281 (2014).

Investor Retention of Interest from Ponzi Scheme. 23 A.L.R.7th Art. 4 (2017).

4-88-111. Investigations — Procedure — Confidential information.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev.

Terrence Cain, Essay: The (Un?) Constitutionality of Compelling Non-Immunized Testimony in Deceptive Trade Practices Investigations Conducted by the Attorney General of the State of Arkansas, 37 U. Ark. Little Rock L. Rev. 91 (2014).

4-88-113. Civil enforcement and remedies — Suspension or forfeiture of charter, franchise, etc.

(a) In any proceeding brought by the Attorney General for civil enforcement of the provisions of this chapter, prohibiting unlawful practices as defined in this chapter, the circuit court may make such orders or judgments as may be necessary to:

(1) Prevent the use or employment by such person of any prohibited practices;

(2)(A) Restore to any purchaser who has suffered any ascertainable loss by reason of the use or employment of the prohibited practices any moneys or real or personal property which may have been acquired by means of any practice declared to be unlawful by this chapter, together with other damages sustained.

(B) In determining the amount of restitution to be awarded under this section, the court shall consider affidavits from nontestifying purchasers, provided that:

(i) The affidavits are offered as evidence of a material fact;

(ii) The affidavits are more probative on the point for which they are offered than any other evidence which the Attorney General can procure through reasonable efforts;

(iii) The interests of justice will be best served by admission of the affidavits; and

(iv) The Attorney General makes the names and addresses of the affiants available to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to communicate with them; and

(3) Assess penalties to be paid to the state, not to exceed ten thousand dollars ($10,000) per violation, against persons found to have violated this chapter.

(b) Upon petition of the Attorney General, the court may order the suspension or forfeiture of franchises, corporate charters, or other licenses or permits or authorization to do business in this state.

(c) Any person who violates the terms of an injunction issued under this chapter shall forfeit and pay to the state a civil penalty of not more than ten thousand dollars ($10,000) for any single action brought by the Attorney General.

(d)(1) Every person, or every partner, officer, or director of another person who directly or indirectly controls another person or who is in violation of or liable under this chapter or every person who directly or

indirectly facilitates, assists, acts as intermediary for, or in any way aids another person who is in violation of or liable under this chapter in the operation or continuance of the act or practice for which the violations or liability exists shall be jointly and severally liable for any penalties assessed and any monetary judgments awarded in any proceeding for civil enforcement of this chapter, if the persons to be held jointly and severally liable knew or reasonably should have known of the existence of the facts by reason of which the violation or liability exists.

(2) There is contribution as in cases of contract among the several persons so liable.

(3) Every person subject to liability under subdivision (d)(1) of this section shall be deemed, as a matter of law, to have purposefully availed himself or herself of the privileges of conducting activities within Arkansas sufficient to subject the person to the personal jurisdiction of the circuit court hearing an action brought pursuant to this chapter.

(e) As compensation for his or her services under this chapter, the Attorney General shall be entitled to all expenses reasonably incurred in the investigation and prosecution of suits, including, but not limited to, expenses for expert witnesses, to be paid by the defendant when judgment is rendered for the state, and, in addition, shall recover attorney's fees and costs.

(f)(1)(A) A person who suffers an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful by this chapter may bring an action to recover his or her actual financial loss proximately caused by the offense or violation, as defined in this chapter.

(B) A private class action under this subsection is prohibited unless the claim is being asserted for a violation of Arkansas Constitution, Amendment 89.

(2) To prevail on a claim brought under this subsection, a claimant must prove individually that he or she suffered an actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under this chapter.

(3) A court may award reasonable attorney's fees.

History. Acts 1971, No. 92, § 11; 1977, No. 835, § 1; A.S.A. 1947, § 70-911; Acts 1991, No. 1177, § 3; 1993, No. 587, § 4; 1995, No. 836, § 4; 1999, No. 990, § 1; 2017, No. 986, § 3; 2021, No. 1015, § 3.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

"(4) The economic effects of romance scams, government imposter scams, and sweepstakes scams is devastating to older adults or vulnerable adults.

"(b) It is the intent of the General Assembly:

"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

Amendments. The 2017 amendment rewrote (f).

The 2021 amendment rewrote (d)(1).

RESEARCH REFERENCES

Ark. L. Rev. Nathan Price Chaney, The Arkansas Deceptive Trade Practices Act: The Arkansas Supreme Court Should Adopt the Specific-Conduct Rule, 67 Ark. L. Rev. 299 (2014).

Britta Palmer Stamps, Recent Developments: Attorney's Fees — Fees May Be Awarded Under Arkansas Deceptive Trade Practices Act Regardless of Overall Prevailing Party, 67 Ark. L. Rev. 1111 (2014).

Margaret E. Rushing, Comment: Deceptively Simple: The Arkansas Deceptive Trade Practices Act, 71 Ark. L. Rev. 1033 (2019).

CASE NOTES

Analysis

In General.

Circuit court properly ruled that the Arkansas Deceptive Trade Practices Act was not applicable to appellant's case because appellant failed to assert that appellee engaged in any type of consumer-oriented act or practice that caused damages. Skalla v. Canepari, 2013 Ark. 415, 430 S.W.3d 72 (2013).

Construction.

—Prior Version of Section.

Building owner's deceptive trade practices claim under the former version of subsection (f) of this section (amended 2017) was properly dismissed where there was no evidence that the owner either knew about a "leak proof" label before the incident that caused water damage or took some action because of it. Apex Oil Co. v. Jones Stephens Corp., 881 F.3d 658 (8th Cir. 2018) (decision under prior version of section).

Building owner's argument that reliance was not an element under the former version of subsection (f) (amended 2017) was rejected as the more natural reading of the former text required proof of reliance, even though not expressly included in the statute, and the 2017 amendment was better viewed as a clarification. Apex Oil Co. v. Jones Stephens Corp., 881 F.3d 658 (8th Cir. 2018) (decision under prior version of section).

Actual Damages.

Jury was properly instructed that licensees could not recover on their deceptive trade practices claim if the only injury they suffered was a diminution in value of the product; the jury could have found that a lack of patent protection resulted in only a diminution in value of the products the licensees contracted to market. Yazdianpour v. Safeblood Techs., Inc., 779 F.3d 530 (8th Cir. 2015).

Trial court abused its discretion in dismissing the doctor's Arkansas Deceptive Trade Practices Act claim because the operator's alleged conduct took advantage of physically infirm customers and was an unconscionable business practice; the doctor alleged actual damages sufficient to withstand a motion to dismiss because he was allegedly terminated due to his resistance to take part in the operator's scheme to increase revenue. Hamby v. Health Mgmt. Assocs., 2015 Ark. App. 298, 462 S.W.3d 346 (2015).

In a foreclosure action, in which borrowers asserted a counterclaim under the Arkansas Deceptive Trade Practices Act based on § 4-88-107(a)(8)(A) and (a)(10), there was no showing that the lender co-trustees, who were the parents of one of the borrowers, were in the business, commerce, or trade of making loans; instead, there was testimony that the borrowers would not qualify for a conventional loan and this was simply a case of parents helping their child, and the circuit court found that borrowers were not damaged. Parker v. Parker, 2017 Ark. App. 242, 520 S.W.3d 693 (2017).

It was not necessary to determine whether the 2017 amendment to this section, requiring "actual financial loss", applied to plaintiff's complaint because he failed to meet the "actual damage or injury" requirement of the pre-2017 version of this section. Parnell v. FanDuel, Inc., 2019 Ark. 412, 591 S.W.3d 315 (2019).

Circuit court properly dismissed a subscriber's complaint and class-action allegations against an internet-based fantasy sports game company for violation of the Arkansas Deceptive Trade Practices Act and unjust enrichment; while the subscriber alleged that the company failed to match his $200 deposit as advertised, he failed to allege any "actual damage or injury" where he made no allegation that he was in any way prevented from spending or withdrawing his deposit from his account and could not demonstrate that the company was unjustly enriched. Parnell v. FanDuel, Inc., 2019 Ark. 412, 591 S.W.3d 315 (2019).

Finding that the dealership violated the Arkansas Deceptive Trade Practices Act was affirmed where the dealership did not make any argument regarding whether the purchaser suffered actual damage or injury and instead simply, and incorrectly, stated that there was no remedy under that statute for any party who was not the Attorney General. America's Pre-Owned Selection, LLC v. Williams, 2021 Ark. App. 67 (2021).

Consumer-Oriented.

Chicken growers' claim that the processor violated the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., was dismissed as the growers failed to plead facts showing that the processor's alleged unequal treatment of growers it contracted with was a consumer-oriented act or practice. Crutchfield v. Tyson Foods, Inc., 2017 Ark. App. 121, 514 S.W.3d 499 (2017).

Circuit court erred in finding that a corporation violated the Arkansas Deceptive Trade Practices Act (ADTPA), § 4-88-101 et seq., because there was simply no "consumer-oriented act" as required for a cause of action under the ADTPA; the circuit court clearly erred in finding that the plaintiff competitor was a consumer for purposes of the ADTPA because the corporation and the competitor were opponents in the market of selling counties' public data. Apprentice Info. Sys. v. DataScout, LLC, 2018 Ark. 149, 544 S.W.3d 536 (2018).

Costs and Fees.

It was necessary to remand for a determination of whether defendant was entitled to attorney's fees on its counterclaim under the Arkansas Deceptive Trade Practices Act, because a party who prevailed on a cause of action to recover actual damages under the Act was eligible for an award of attorney's fees, in the discretion of the court, even when another party was the prevailing party in the overall action. G&K Servs. Co. v. Bill's Super Foods, Inc., 766 F.3d 797 (8th Cir. 2014).

In a deceptive trade practices action, the circuit court's award of attorney's fees, costs, and expenses to the State comported with the language of this section where the practice of the attorney general was to record the cumulative hours regarding certain work on the day the work was completed, and there was no error in the circuit court's acceptance of the State's explanation. Pleasant v. State ex rel. McDaniel, 2019 Ark. App. 248, 576 S.W.3d 90 (2019).

Elements of Claim.

In a case alleging negligence, breach of contract, breach of warranty, strict product liability, and violations of the Arkansas Deceptive Trade Practices Act based on a claim that a casket was defective, the complaint failed to include the elements of the causes of actions pled because it failed to state facts that linked the damages to the conduct or product supplied; there was no way of knowing the condition of the casket purchased since it had not been disinterred or inspected since its burial in

1996. Clayton v. Batesville Casket Co., 2015 Ark. App. 361, 465 S.W.3d 441 (2015).

Substantial evidence existed that the officer, acting for the company, omitted or concealed material facts in connection with the home services; he made representations about his age, education, experience, and insurance coverage that were false, and thus there was sufficient evidence for the jury to have found that the failure to speak truthfully caused the owners damage, and thus substantial evidence supported the jury's finding on the deceptive trade practices claim. Roggasch v. Sims, 2016 Ark. App. 44, 481 S.W.3d 440 (2016).

Individual Liability.

Because substantial evidence supported the jury's finding on the deceptive trade practices claim, there was no error in the corporate officer being held individually accountable. Roggasch v. Sims, 2016 Ark. App. 44, 481 S.W.3d 440 (2016).

Odometer.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble damages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

Violation Not Shown.

In a case that set aside a foreclosure decree due to improper service on the property owner, the foreclosure sale purchaser did not have a cause of action against the foreclosure mortgagee under the Arkansas Deceptive Trade Practices Act; the purchaser did not challenge the circuit court's finding that the foreclosure mortgagee's actions were neither intentional nor reckless. MidFirst Bank v. Sumpter, 2016 Ark. App. 552, 508 S.W.3d 69 (2016).

4-88-115. Statute of limitations.

CASE NOTES

Statute of Limitations.

In a creditor's breach of contract suit arising from cross-defaulted loan agreements, counterclaims asserting causes of action for fraud, breach of fiduciary duty, negligence, breach of contract, and deceptive trade practices were time-barred. Bank of Am., N.A. v. JB Hanna, LLC, 766 F.3d 841 (8th Cir. 2014).

4-88-116. Right to jury trial.

Any party in an action brought under § 4-88-113(f) shall have the right to a jury trial if the action was pending or filed on or after August 1, 2017.

History. Acts 2017, No. 986, § 4.

4-88-117. Durable medical equipment — Definition.

(a) As used in this section, "durable medical equipment" means a good that qualifies for insurance reimbursement and requires a referral or prescription of a licensed physician or a licensed advanced practice registered nurse.

(b) A person shall not represent or advertise that a consumer's health insurance, health benefit plan, Medicare, or Medicaid will cover

any portion of the cost of durable medical equipment unless a licensed physician or a licensed advanced practice registered nurse has made a referral for or prescribed the durable medical equipment for the consumer before an agreement to purchase durable medical equipment is executed between a consumer and seller of the durable medical equipment.

(c) Notwithstanding any provision of this section, a provision in an agreement to purchase durable medical equipment does not violate this section if the consumer has signed a conspicuous waiver that contains no other information or agreements and clearly states that the consumer understands that Medicare, Medicaid, a health benefit plan, a health insurance plan, or any other insurance plan may only cover the cost of the durable medical equipment upon approval by the consumer's licensed physician or licensed advanced practice registered nurse.

(d)(1) If an agreement to purchase durable medical equipment contains a provision that violates this section, the agreement to purchase durable medical equipment is void.

(2) If an agreement to purchase durable medical equipment is voided under subdivision (d)(1) of this section, a consumer may receive full reimbursement for the durable medical equipment.

(3) If a consumer seeks reimbursement for a transaction, the consumer shall return the durable medical equipment upon the request of the seller of the durable medical equipment and at the expense of the seller of the durable medical equipment.

(e)(1) A transaction for durable medical equipment shall have a thirty-day return policy.

(2) Durable medical equipment may be returned for any reason.

(3) Notification of a return of durable medical equipment:

(A) Shall be given by the consumer within thirty (30) days of the agreement to purchase durable medical equipment; and

(B) May be given to the seller of the durable medical equipment in writing or over the telephone.

(4)(A) A seller of durable medical equipment shall not deny a reimbursement for durable medical equipment because the durable medical equipment has not been returned.

(B) However, a consumer shall be permitted to return the durable medical equipment at the expense of the seller of the durable medical equipment within a reasonable amount of time after notification of the return.

History. Acts 2019, No. 1065, § 1.

Subchapter 2 — Enhanced Penalties When Elder Persons or Persons With Disabilities Are Targeted

4-88-201. Definitions.

As used in this subchapter:

(1) "Account" means funds or assets held by a financial services provider, including without limitation:

(A) A deposit account;

(B) A checking account;

(C) A money market account;

(D) A savings account;

(E) A share account;

(F) A certificate of deposit;

(G) A trust account;

(H) An individual retirement account or other type of retirement account;

(I) A guardianship or conservatorship account;

(J) An investment or securities account;

(K) A loan;

(L) A credit card; or

(M) Any extension of credit, including a home equity line of credit;

(2) "Elder person" means a person who is sixty (60) years of age or older;

(3) "Exploitation" means the act of forcing, compelling, or exerting undue influence over a person causing the person to act in a way that is inconsistent with the person's relevant past behavior or causing the person to perform services or purchase goods and services for the benefit of another person;

(4) "Financial exploitation" means:

(A) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of an elder person or person with a disability, including incurring debt in the name of an elder person or person with a disability for the benefit of a third party; or

(B) Any act or omission taken by an individual, including through the use of a power of attorney, guardianship, or conservatorship of an elder person or person with a disability, to either:

(i) Obtain control through deception, intimidation, or undue influence over the elder person's or person with a disability's money, assets, or property to deprive the elder person or person with a disability of the ownership, use, benefit, or possession of his or her money, assets, or property; or

(ii) Convert money, assets, or property of the elder person or person with a disability to deprive the elder person or person with a disability of the ownership, use, benefit, or possession of his or her money, assets, or property;

(5) "Financial services provider" means an entity, including the entity's employees and officers, regulated by the State Bank Department or a similar federal regulatory agency, engaged in or transacting business in this state, including without limitation:

(A) A state or national bank or trust company;

(B) A state or federal savings and loan association;

(C) A state or federal credit union;

(D) A building and loan association;

(E) A mortgage banker, mortgage broker, loan officer, or mortgage servicer under the Fair Mortgage Lending Act, § 23-39-501 et seq.; or

(F) A pawnbroker;

(6) "Financial transaction" means:

(A) A transfer or request to transfer or disburse funds or assets in an account;

(B) A request to initiate a wire transfer, initiate an automated clearing house transfer, or issue a money order, cashier's check, or official check;

(C) A request to negotiate a check or other negotiable instrument;

(D) A request to change the ownership of an account;

(E) A request for a loan, extension of credit, or draw on a line of credit;

(F) A request to transfer the title to any real property or the title of any motor vehicle or mobile home, or to encumber the real property, motor vehicle, or mobile home;

(G) Expanding access to an account through an online or telephone banking system or adding an additional person as an authorized signer or person otherwise authorized to initiate transactions in the account; or

(H) Opening or establishing a new account;

(7) "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(8)(A) "Person with a disability" means a person who has a physical or mental impairment which substantially limits one (1) or more of such person's major life activities.

(B) As used in this subdivision, "physical or mental impairment" means any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one (1) or more of the following body systems:

(a) Neurological;

(b) Musculoskeletal;

(c) Special sense organs;

(d) Respiratory, including speech organs;

(e) Cardiovascular;
(f) Reproductive;
(g) Digestive;
(h) Genitourinary;
(i) Hemic and lymphatic;
(j) Skin; or
(k) Endocrine; or

(ii) Any mental or psychological disorder, including intellectual and developmental disabilities, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(C) The term "physical or mental impairment" includes without limitation diseases and conditions such as orthopedic, visual, speech and hearing impairment, cerebral palsy, spina bifida, Down syndrome, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual and developmental disabilities, and emotional illness; and

(9) "Substantially limits" means substantially interferes with or affects over an extended period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments that substantially limit a person's major life activities. Examples of minor temporary ailments are colds, influenza, sprains, or minor injuries.

History. Acts 1993, No. 138, § 1; 2011, No. 68, § 1; 2019, No. 1035, § 1; 2021, No. 1015, § 4.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

"(4) The economic effects of romance scams, government imposter scams, and sweepstakes scams is devastating to older adults or vulnerable adults.

"(b) It is the intent of the General Assembly:

"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

Amendments. The 2019 amendment substituted "'Person with a disability'" for "'Disabled person'" in the introductory language of (b); substituted "including intellectual and developmental disabilities" for "such as mental retardation" in (b)(1)(B); and substituted "intellectual and developmental disabilities" for "mental retardation" in (b)(2).

The 2021 amendment rewrote the section.

4-88-202. Civil penalty — Disposition of funds.

(a) If any person is found to have violated any provision of this chapter, including unlawful practices related to charitable solicitations, and the violation is committed against an elder person or a person with

a disability, in addition to any civil penalty otherwise set forth or imposed, the court may impose an additional civil penalty not to exceed ten thousand dollars ($10,000) for each violation.

(b) The civil penalties imposed pursuant to subsection (a) of this section shall be deposited with the Treasurer of State and placed into the Elder Person and Person with a Disability Victims Fund, a special fund created in the State Treasury and administered by the Attorney General for the investigation and prosecution of deceptive acts against an elder person or a person with a disability and for consumer education initiatives.

History. Acts 1993, No. 138, § 1; 2019, No. 1035, § 2.

Amendments. The 2019 amendment substituted "an elder person or a person with a disability" for "elder or disabled persons" in (a); and, in (b), substituted "Elder Person and Person with a Disability Victims Fund" for "Elder and Disabled Victims Fund" and substituted "against an elder person or a person with a disability" for "against elder and disabled persons".

4-88-203. Determination of civil penalty.

In determining whether to impose an enhanced civil penalty under this subchapter and the amount thereof, the court shall consider the extent to which one (1) or more of the following factors are present:

(1) Whether the defendant's conduct was in disregard of the rights of the elder person or person with a disability;

(2) Whether the defendant knew or should have known that the defendant's conduct was directed to an elder person or person with a disability;

(3) Whether the elder person or person with a disability was more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability than other persons and whether the elder person or person with a disability actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;

(4) Whether the defendant's conduct caused an elder person or person with a disability to suffer any of the following:

(A) Mental or emotional anguish;

(B) Loss of or encumbrance upon a primary residence of the elder person or person with a disability;

(C) Loss of or encumbrance upon the elder or disabled person's principal employment or principal source of income;

(D) Loss of funds received under a pension or retirement plan or a government benefits program;

(E) Loss of property set aside for retirement or for personal or family care and maintenance; or

(F) Loss of assets essential to the health and welfare of the elder person or person with a disability; or

(5) Any other factors the court deems appropriate.

History. Acts 1993, No. 138, § 1; 2019, No. 1035, § 2.

Amendments. The 2019 amendment substituted "elder person or person with a disability" for "elder or disabled person" throughout the section.

4-88-204. Cause of action.

An elder person or person with a disability who suffers damage or injury as a result of an offense or violation described in this chapter has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Restitution ordered pursuant to this section has priority over a civil penalty imposed pursuant to this subchapter.

History. Acts 1993, No. 138, § 1; 2019, No. 1035, § 2.

Amendments. The 2019 amendment substituted "elder person or person with a disability" for "elder or disabled person".

4-88-205. Education initiatives.

The Attorney General shall, pursuant to the funds allocated in this subchapter, develop and implement statewide educational initiatives to inform elder persons and persons with a disability, law enforcement agencies, the judicial system, social services professionals, and the general public as to the prevalence and prevention of consumer crimes against elder persons or persons with a disability, the provisions of this chapter, the penalties for violations of this chapter, and the remedies available for victims of violations.

History. Acts 1993, No. 138, § 1; 2019, No. 1035, § 2.

Amendments. The 2019 amendment substituted "an elder person and a person with a disability" for "elder persons and disabled persons" and substituted "an elder person or person with a disability" for "elder and disabled persons".

4-88-206. Referrals for exploitation and deceptive and unconscionable trade practices.

(a) The Attorney General shall establish and maintain referral procedures with the Adult Protective Services Unit of the Department of Human Services in order to provide any necessary intervention and assistance to an elder person or person with a disability who may have been victimized by violations of this chapter.

(b) In order to provide any necessary intervention and assistance to an elder person or a person with a disability, as defined in this subchapter, who may have been victimized by a person who is in violation of this chapter, the Adult Protective Services Unit of the Department of Human Services shall refer to the Consumer Protection Division within the office of the Attorney General any cases involving suspected exploitation and financial exploitation, as defined in § 4-88-201, to the Attorney General within forty-eight (48) hours of receipt, or at the close of business on the next business day if there is an intervening weekend or state holiday.

History. Acts 1993, No. 138, § 1; 2017, No. 913, § 10; 2019, No. 1035, § 2; 2021, No. 1015, § 5.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

"(4) The economic effects of romance scams, government imposter scams, and sweepstakes scams is devastating to older adults or vulnerable adults.

"(b) It is the intent of the General Assembly:

"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

Amendments. The 2017 amendment substituted "Division of Aging, Adult, and Behavioral Health Services of" for "Division of Aging and Adult Services within".

The 2019 amendment substituted "an elder person or person with a disability" for "elder or disabled persons".

The 2021 amendment substituted "exploitation and deceptive and unconscionable trade practices" for "abuse, neglect, and exploitation" in the section heading; substituted "Adult Protective Services Unit" for "Division of Aging, Adult, and Behavioral Health Services" in (a); and added (b).

4-88-207. Elder Person and Person with a Disability Victims Fund created.

The "Elder Person and Person with a Disability Victims Fund" is hereby created and established on the books of the Treasurer of State, Auditor of State, and Chief Fiscal Officer of the State and shall consist of those special funds as may be provided by law. This fund shall be used for the investigation and prosecution of deceptive acts against an elder person or person with a disability and for consumer education initiatives directed toward elder persons or persons with a disability, law enforcement officers, the judicial system, social services professionals, and the general public on the provisions of this chapter and related statutes.

History. Acts 1993, No. 138, § 2; 2019, No. 1035, § 2.

Amendments. The 2019 amendment substituted "Elder Person and Person with a Disability Victims Fund" for "Elder and Disabled Victims Fund" in the section heading and in the section; and substituted "an elder person or person with a disability" for "elder and disabled persons" twice.

4-88-208. Financial services provider — Refusal or delay of financial transactions — Temporary hold on financial transactions.

(a)(1) If a financial services provider has reasonable cause to suspect that financial exploitation may have occurred, may have been attempted, or is being attempted, the financial services provider may

refuse or delay the execution of a financial transaction of an elder person or a person with a disability, on an account:

(A) Of which the elder person or person with a disability is the owner or co-owner;

(B) Of which the elder person or person with a disability is a beneficiary, including a trust, guardianship, or conservatorship account; or

(C) Of a person suspected of perpetrating the financial exploitation.

(2) A financial services provider may also refuse or delay the execution of a financial transaction under this section if the Attorney General, a state agency, or a law enforcement agency provides information to the financial services provider demonstrating that it is reasonable to believe that financial exploitation may have occurred, may have been attempted, or is being attempted.

(b) Except as ordered by a court, a financial services provider is not required to refuse or delay the execution of a financial transaction under this section and may use its discretion to determine whether to refuse or delay the execution of a financial transaction based on the information available to the financial services provider.

(c) A financial services provider that refuses to execute a financial transaction or places a hold on a financial transaction based on reasonable cause to suspect that financial exploitation may have occurred, may have been attempted, or is being attempted may:

(1) Except with regard to an account administered by a bank or trust company in a fiduciary capacity, make a reasonable effort to notify one (1) or more parties authorized to transact business on the account orally or in writing;

(2) If the incident involves financial exploitation, report the incident to the Department of Human Services under § 4-88-206(b); and

(3) If the incident is reported to the department under § 4-88-206(b), make reasonable effort to notify a third party reasonably associated with the elder person or person with a disability of the suspected financial exploitation, regardless of whether or not the third party is authorized to transact business on the account orally or in writing.

(d) Notwithstanding subsection (c) of this section, a financial services provider may elect not to provide notice to any party authorized to conduct business on the account or reasonably associated with the elder person or person with a disability if the party is the suspected perpetrator of financial exploitation.

(e) A refusal by a financial services provider to execute a financial transaction or place a hold on a financial transaction as authorized by this section, based on the financial services provider's reasonable cause to suspect that financial exploitation may have occurred, may have been attempted, or is being attempted, expires when the financial services provider reasonably believes that the financial transaction will not result in financial exploitation unless terminated earlier by an order of a court of competent jurisdiction.

(f) A financial services provider or an officer, director, employee, agent, or other representative of a financial services provider, acting in a reasonable manner, is immune from all criminal, civil, and administrative liability for the following:

(1) Refusing or not refusing to execute a financial transaction or holding or not holding a financial transaction under this section; and

(2) An action taken in furtherance of the determination made under subdivision (f)(1) of this section if the determination was based upon a reasonable belief.

History. Acts 2021, No. 1015, § 6.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

"(4) The economic effects of romance scams, government imposter scams, and sweepstakes scams is devastating to older adults or vulnerable adults.

"(b) It is the intent of the General Assembly:

"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

4-88-209. Protection of consumers from financial exploitation.

(a) If necessary to provide intervention and assistance to consumers, including elder persons or persons with a disability, the Attorney General may petition a court of competent jurisdiction requesting an order delaying or extending a delay of disbursement of funds.

(b) The delay shall expire:

(1) As directed by an order of the court;

(2) When the Attorney General reasonably determines that the financial transaction will not result in financial exploitation; or

(3) No more than ten (10) business days after the date on which the petition was filed with the court.

(c)(1) A financial services provider shall, upon request by the Attorney General, provide access to or copies of records that are relevant to suspected financial exploitation or attempted financial exploitation to the Attorney General.

(2) The records should include historical records as well as records relating to the most recent transactions or transactions that may compromise financial exploitation.

(d) The records, materials, data, and information made available by a financial services provider are confidential and shall not be disclosed to any person other than those persons specifically authorized by the Attorney General to receive the information.

(e) A financial services provider is immune from any civil or criminal liability that might otherwise result from complying with this section.

History. Acts 2021, No. 1015, § 6.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

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"(1) To protect consumers from deceptive acts or practices in commerce;

"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

4-88-210. Report by financial services provider to local and state law enforcement of suspicious activity.

(a) A financial services provider that voluntarily or mandatorily reports via a suspicious activity report, pursuant to 31 U.S.C. § 5318(g), as it existed on January 1, 2021, any violation of law or rule constituting a violation of this chapter, may also report the information contained in the suspicious activity report to local or state law enforcement agencies, including the Attorney General.

(b) A financial services provider is immune from any civil or criminal liability that might otherwise result from complying with this section.

History. Acts 2021, No. 1015, § 6.

A.C.R.C. Notes. Acts 2021, No. 1015, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) Protecting older adults and vulnerable adults is a priority for our state;

"(2) The number of cases involving scams or exploitation of older adults or vulnerable adults has quadrupled in the last three (3) years, yet older adults or vulnerable adults are the least likely of any age or socioeconomic group to report losing money to fraud;

"(3) Older adults are using wire transfers and other types of electronic payment methods to send money to fraudulent people who are perpetuating romance scams, government imposter scams, and sweepstakes scams; and

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"(2) To arm the financial institutions in this state, as well as the Attorney General and other law enforcement agencies, with the tools needed to recognize, report, delay, and combat financial exploitation; and

"(3) To commit to protecting older adults and vulnerable adults through innovative and aggressive tactics."

Subchapter 3 — Protection of Consumers from Price Gouging and Unfair Pricing Practices During and Shortly After a State of Emergency

SECTION.
4-88-304. Penalties, remedies, and enforcement.

4-88-304. Penalties, remedies, and enforcement.

(a)(1) When a person violates this subchapter or a rule prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by this chapter.

(2) All remedies, penalties, and authority granted to the Attorney General under this chapter shall be available to the Attorney General for the enforcement of this subchapter.

(b) Any person who is found to have violated this subchapter shall be guilty of a Class A misdemeanor.

(c) The remedies and penalties provided by this section are cumulative to each other, the remedies under § 17-25-301 et seq., and the remedies or penalties available under all other laws of this state.

History. Acts 1997, No. 376, § 1; 2005, No. 1994, § 218; 2019, No. 315, § 130.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a)(1).

Subchapter 4 — "Slamming" in the Telecommunications Industry

SECTION.
4-88-403. Penalties, remedies, and enforcement.

4-88-403. Penalties, remedies, and enforcement.

(a) When a person violates this subchapter or a rule prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by this chapter.

(b)(1) All remedies, penalties, and authority granted to the Attorney General under this chapter shall be available to the Attorney General for the enforcement of this subchapter.

(2) The remedies and penalties provided by this section are cumulative to each other and the remedies or penalties available under all other laws of this state.

History. Acts 1999, No. 1489, § 1; 2019, No. 315, § 131.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a).

Subchapter 8 — Fair Disclosure of State Funded Payments for Pharmacists' Services Act

SECTION.
4-88-803. Required practices.

Effective Dates. Acts 2018 (2nd Ex. Sess.), No. 1, § 7: Mar. 15, 2018, §§ 1, 2, 3, and 5. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the unregulated behavior of pharmacy benefits managers is threatening the sustainability of pharmacies in Arkansas; that regulation of pharmacy benefits managers by the State Insurance Department will stabilize the pharmacy industry in this state; and that Section 1, 2, 3, and 5 of this act are immediately necessary to ensure that Arkansas residents have continued access to pharmacy services across the state. Therefore, an emergency is declared to exist, and Sections 1, 2, 3, and 5 of this act, being immediately necessary for the preservation of the public peace, health, and safety, shall become effective on: (1) The date of the act's approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2018 (2nd Ex. Sess.), No. 3, § 7: Mar. 19, 2018, §§ 1, 2, 3, and 5. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the unregulated behavior of pharmacy benefits managers is threatening the sustainability of pharmacies in Arkansas; that regulation of pharmacy benefits managers by the State Insurance Department will stabilize the pharmacy industry in this state; and that Section 1, 2, 3, and 5 of this act are immediately necessary to ensure that Arkansas residents have continued access to pharmacy services across the state. Therefore, an emergency is declared to exist, and Sections 1, 2, 3, and 5 of this act, being immediately necessary for the preservation of the public peace, health, and safety, shall become effective on: (1) The date of the act's approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

4-88-803. Required practices.

(a) A PBM, when seeking payment or reimbursement for pharmacist services provided in connection with a pharmacy benefits plan or program or reporting expenditures for pharmacist services provided in connection with a pharmacy benefits plan or program, shall itemize by individual claim:

(1) The amount actually paid or to be paid to the pharmacy or pharmacist for the pharmacist services;

(2) The identity of the pharmacy or pharmacist actually paid or to be paid; and

(3) The prescription number or other identifier of the pharmacist services.

(b) A PBM shall pay the amounts it receives for pharmacist services provided in connection with a pharmacy benefits plan or program to the pharmacies or pharmacists that provided the pharmacist services.

(c) This section does not:

(1) Require a PBM to set specific fees, rates, or schedules for payment for pharmacist services;

(2) Prohibit a PBM from charging for any services in addition to pharmacist services; or

(3) Require a PBM to pay a pharmacy or pharmacist more on any claim than the amount disclosed under subdivision (a)(1) of this section.

(d)(1) Unless otherwise required more frequently by the Insurance Commissioner, a pharmacy benefits manager shall file an annual report with the commissioner providing the information required under subsection (a) of this section pursuant to the timing, format, and requirements issued by rule of the State Insurance Department.

(2) The annual report is:

(A) Considered proprietary and confidential under § 23-61-107(a)(4) and § 23-61-207; and

(B) Not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(3) This section is not subject to § 4-88-113(f)(1)(B).

History. Acts 2009, No. 769, § 1; 2018 (2nd Ex. Sess.), No. 1, § 2; 2018 (2nd Ex. Sess.), No. 3, § 2.

Amendments. The 2018 (2nd Ex. Sess.) amendment by identical acts Nos. 1 and 3 added (d).

Subchapter 9 — Unfair Practices Related to Residential Real Estate Repair Contracts

4-88-901. Applicability.

(a) This subchapter applies to a residential real estate repair contract under which a person has contracted with a residential contractor to provide goods or services to be paid from the proceeds of a property and casualty insurance policy.

(b) The rights and responsibilities contained in this subchapter are in addition to those under § 4-89-101 et seq. and § 17-25-501.

History. Acts 2013, No. 1360, § 1.

4-88-902. Definitions.

As used in this subchapter:

(1)(A) "Emergency services" means services performed with the express permission of the insured and that are immediately necessary for:

(i) The preservation of the residential real estate; or

(ii) The health of the insured, owner, or possessor.

(B) "Emergency services" does not include inspection of the residential real estate or an estimation of the repair costs;

(2) "Insured" means the person whose name appears on the face of the property and casualty insurance policy;

(3) "Residential contractor" means a person or entity in the business of contracting or offering to contract with an insured, owner, or possessor of residential real estate to repair or replace roof systems or

perform other exterior repair, replacement, construction, or reconstruction work on residential real estate;

(4) "Residential real estate" means a new or existing dwelling constructed for habitation by one (1) to four (4) families, including a detached garage;

(5) "Residential real estate repair contract" means a written contract with an insured to repair residential real estate and provide goods and services to be paid under a property and casualty insurance policy; and

(6) "Roof system" means roof coverings, roof sheathing, roof weatherproofing, and insulation.

History. Acts 2013, No. 1360, § 1.

4-88-903. Notice of cancellation.

Before signing a residential real estate repair contract with an insured, a residential contractor shall furnish to the insured:

(1) The following statement in at least 10-point boldface type, the following:

"You may cancel this residential real estate repair contract at any time within three (3) business days after you have received written notification from your insurer that all or any part of the claim or residential real estate repair contract is not a covered loss under the insurance policy. See attached notice of cancellation form for an explanation of this right."; and

(2) A fully completed form in duplicate, captioned "NOTICE OF CANCELLATION", that is attached to the residential real estate repair contract for repairs to residential real estate, that is easily detachable, and contains the following in at least 10-point boldface type:

"NOTICE OF CANCELLATION

(Enter date of transaction)

If you are notified by your insurer that all or any part of the claim or residential real estate repair contract is not a covered loss under the insurance policy, you may cancel the residential real estate repair contract by mailing or delivering a signed and dated copy of this cancellation notice or another written notice to (name of residential contractor) at (address of residential contractor's place of business) at any time within three (3) business days after you have received such notice from your insurer. If you cancel, any payments made under the residential real estate repair contract except for certain emergency services already performed by the residential contractor will be returned to you within ten (10) business days following receipt by the residential contractor of your cancellation notice.

I CANCEL THIS TRANSACTION

_____

(DATE)

_____

(INSURED'S SIGNATURE)."

History. Acts 2013, No. 1360, § 1.

4-88-904. Commencement of work — Cancellation.

(a) A residential contractor in a residential real estate repair contract with an insured shall not commence work until the insured's right to cancel under subsection (b) of this section has expired.

(b) A person who has entered into a residential real estate repair contract with a residential contractor may cancel the residential real estate repair contract within three (3) business days after the insured has received written notice from the insurer in response to an insurance claim filed that all or any part of the claim or residential real estate repair contract is not a covered loss under the insurance policy.

(c)(1) The insured cancels the residential real estate repair contract by giving written notice of cancellation to the residential contractor in person or by mailing it to the address stated in the residential real estate repair contract.

(2) If the notice of cancellation is given by mail, it is effective upon deposit of the notice in the United States mail, postage prepaid, and properly addressed to the residential contractor.

(3) The notice of cancellation is not required to be in a particular form and is sufficient if it expresses in writing an intention of the insured not to be bound by the residential real estate repair contract.

(d)(1) Within ten (10) days after cancellation of a residential real estate repair contract, the residential contractor shall tender to the insured any payments, partial payments, or deposits made and any note or other evidence of indebtedness.

(2) If the residential contractor has performed any emergency services, the residential contractor is entitled to the reasonable value of such emergency services.

(e) Any provision in a residential real estate repair contract that requires the payment of a fee for anything except emergency services is not enforceable against the insured that has cancelled a residential real estate repair contract under this section.

History. Acts 2013, No. 1360, § 1.

4-88-905. Violations.

(a) A violation of this subchapter by a residential contractor is an unfair and deceptive act or practice as defined by this chapter.

(b) This subchapter does not prohibit an insured that is harmed by a deceptive trade practice from commencing a civil action against a residential contractor.

History. Acts 2013, No. 1360, § 1.

Subchapter 10 — Patient Rights Regarding Payment for Pharmacists Services Act

4-88-1001. Title.

This subchapter shall be known and may be cited as the "Patient Rights Regarding Payment for Pharmacists Services Act".

History. Acts 2015, No. 1025, § 1.

4-88-1002. Definitions.

As used in this subchapter:

(1) "Pharmacist" means a licensed pharmacist as defined in § 17-92-101;

(2) "Pharmacists services" means products, goods, or services provided as a part of the practice of pharmacy as defined in § 17-92-101, to individuals who reside or are employed in this state;

(3) "Pharmacy" means the same as defined in § 17-92-101;

(4) "Pharmacy benefits manager" means an entity that administers or manages a pharmacy benefits plan or program;

(5) "Pharmacy benefits plan or program" means any plan or program that pays for, reimburses, covers the cost of, or otherwise provides for pharmacists services to individuals who reside or are employed in this state;

(6) "Provider choice" means an individual's choice of provider network, individual pharmacy or pharmacist, or method of delivery under a pharmacy benefits plan or program; and

(7) "Provider network" means a network of pharmacists or pharmacies that are authorized by a pharmacy benefits plan or program to provide pharmacists services.

History. Acts 2015, No. 1025, § 1.

4-88-1003. Change in choice of provider without express consent — Prohibited.

(a) When an individual's consent to altering or changing provider choice is required, the individual's express consent to effect such change within the pharmacy benefits plan or program provider network shall be obtained.

(b) An alteration or change in provider choice that is subject to an individual's later opting out of the alteration or change does not satisfy subsection (a) of this section.

History. Acts 2015, No. 1025, § 1.

4-88-1004. Limitation — Patient payment.

An individual shall not be required to make a payment for pharmacists services in an amount greater than the pharmacist or pharmacy providing the pharmacists services may retain from all payment sources.

History. Acts 2015, No. 1025, § 1.

4-88-1005. Enforcement.

The Insurance Commissioner shall:

(1) Enforce this subchapter using powers granted to the commissioner in the Arkansas Insurance Code; and

(2) Be entitled to seek an injunction against a pharmacy benefits manager in a court of competent jurisdiction.

History. Acts 2015, No. 1025, § 1.

Publisher's Notes. The Arkansas Insurance Code, referred to in this section, was originally enacted by Acts 1959, No. 148. Acts 1959, No. 148 is codified as set out in the note following § 23-60-101.

CHAPTER 90

AUTOMOBILES

SUBCHAPTER.

Subchapter 2 — Odometer Regulations

SECTION.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled 'Funding and classification of cabinet-level department secretaries' and 'Transformation and Efficiencies Act transition team' should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health,

and safety shall become effective on July 1, 2019."

4-90-201. Legislative intent and purpose.

The General Assembly recognizes that a motor vehicle is a major consumer acquisition and that buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle. The General Assembly further recognizes that buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the motor vehicle and that an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle. The purposes of this subchapter are to prohibit tampering with motor vehicle odometers and to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers. It is the intent of the General Assembly that this subchapter incorporate certain provisions of newly codified federal law to supplement existing Arkansas law. To that end, any state rule or federal rule or regulation in effect under a law replaced by this subchapter continues in effect under the corresponding provision enacted by this subchapter until repealed, amended, or superseded. In addition, where no substantive change in law has occurred, an action taken or an offense committed under a law replaced by a section of this subchapter is deemed to have been taken or committed under the corresponding provision enacted by this subchapter.

History. Acts 1995, No. 795, § 1; 2019, No. 315, § 132.

Amendments. The 2019 amendment substituted "any state rule or federal rule or regulation" for "any rule or regulation" in the fifth sentence.

4-90-203. Penalties and enforcement.

(a)(1)(A) When a person violates this subchapter or a rule prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(B) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this subchapter, including, but not limited to, an action to:

(i) Enjoin the violation; and

(ii) Recover:

(a) Amounts for which the person is liable under § 4-90-207(a) to each private person; and

(b) Costs, investigative costs, and reasonable attorney's fees.

(2)(A) An action under this subsection may be brought in an appropriate court of competent jurisdiction in the county in which the person resides or transacts business or in the judicial district in which the state capital is located.

(B) The action must be brought not later than five (5) years after the claim accrues.

(b)(1) Any person who is found to have violated this subchapter shall be guilty of a felony and imprisoned for not more than three (3) years and subject to a fine of not more than fifty thousand dollars ($50,000) for each violation.

(2) If the person is a corporation, the penalties of this subsection also apply to a director, officer, or individual agent of a corporation who knowingly and willfully authorizes, orders, or performs an act in violation of this subchapter or a rule prescribed or order issued under this subchapter, without regard to penalties imposed on the corporation.

History. Acts 1995, No. 795, § 6; 2019, No. 315, §§ 133, 134.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a)(1)(A) and (b)(2).

CASE NOTES

Award Upheld.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble damages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

4-90-204. Preventing tampering.

RESEARCH REFERENCES

ALR. Validity, Construction and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer — Validity of Statutory Provisions, Construction of Statute and Particular Terms, and Remedies. 66 A.L.R.6th 351.

Validity, Construction, and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer — Statutes of Limitation, Parties to Action, Evidentiary Matters, and Particular Violations of Statute. 67 A.L.R.6th 209.

CASE NOTES

Violation.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble damages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

4-90-205. Service, repair, and replacement.

CASE NOTES

Violation.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble damages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

4-90-206. Disclosure requirements on transfer of a motor vehicle.

(a)(1) A person transferring his or her ownership of a motor vehicle shall give the transferee a written disclosure:

(A) Of the cumulative mileage registered by the odometer; or

(B) That the mileage is not actual, if the transferor knows that the mileage registered by the odometer is incorrect.

(2) A person making a written disclosure required by a rule prescribed under subdivision (a)(1) of this section may not make a false statement in the disclosure.

(3) A person acquiring a motor vehicle for resale may accept a disclosure under this section only if it is complete.

(4) The Secretary of the Department of Finance and Administration shall adopt, pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., rules not inconsistent with this subchapter or Title 49, Chapter 327 of the United States Code, or any rules promulgated thereunder prescribing the manner in which the written disclosure shall be made.

(b)(1) A motor vehicle, the ownership of which is transferred, may not be licensed for use in this state unless the transferee, in submitting an application for the title on which the license will be issued, includes with the application the transferor's title and, if that title contains the appropriate space, the transferor's disclosure of the mileage at the time of transfer, and the signature and the date of the disclosure.

(2)(A) If the title to a motor vehicle issued to a transferor is in the possession of a lienholder when the transferor transfers ownership of the vehicle, the transferor may use a written power of attorney in making the mileage disclosure required under subsection (a) of this section.

(B) The secretary shall adopt, pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., rules not inconsistent with this subchapter or Title 49, Chapter 327 of the United States Code, or any rules promulgated thereunder prescribing the form of the power of attorney.

(C) The provisions of § 4-90-203 and § 4-90-207(a) apply to a person granting or granted a power of attorney under this subdivision (b)(2).

(c)(1) For a leased motor vehicle, the lessee shall provide the written disclosure required by subsection (a) of this section to the lessor when the lessor transfers ownership of that vehicle.

(2) The lessor shall provide written notice to the lessee of:

(A) The mileage disclosure requirements of subsection (a) of this section; and

(B) The penalties for failure to comply with those requirements.

(3) The lessor shall retain the disclosures made by a lessee under subdivision (c)(1) of this section for at least four (4) years following the date the lessor transfers the leased motor vehicle.

(4) If the lessor transfers ownership of a leased motor vehicle without obtaining possession of the vehicle, the lessor, in making the disclosure required by subsection (a) of this section, may indicate on the title the mileage disclosed by the lessee under subdivision (c)(1) of this section, unless the lessor has reason to believe that the disclosure by the lessee does not reflect the actual mileage of the vehicle.

(d) If a motor vehicle is sold at an auction, the auction company conducting the auction shall maintain the following records for at least four (4) years after the date of the sale:

(1) The name and address of the most recent owner of the motor vehicle, except the auction company;

(2) The name and address of the buyer of the motor vehicle;

(3) The vehicle identification number of the motor vehicle; and

(4) The odometer reading on the date the auction company took possession of the motor vehicle.

History. Acts 1995, No. 795, § 5; 1997, No. 809, § 5; 2019, No. 315, § 135; 2019, No. 910, §§ 3356, 3357.

Amendments. The 2019 amendment by No. 315 substituted "rule" for "regulation" in (a)(2).

The 2019 amendment by No. 910 substituted "Secretary of the Department of Finance and Administration" for "Director of the Department of Finance and Administration" in (a)(4); and substituted "The secretary" for "The director" in (b)(2)(B).

RESEARCH REFERENCES

ALR. Validity, Construction and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer — Validity of Statutory Provisions, Construction of Statute and Particular Terms, and Remedies. 66 A.L.R.6th 351.

Validity, Construction, and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer — Statutes of Limitation, Parties to Action, Evidentiary Matters, and Particular Violations of Statute. 67 A.L.R.6th 209.

4-90-207. Civil actions by private persons.

(a)(1) A person who violates this subchapter or a rule prescribed under this subchapter with intent to defraud is liable for three (3) times the actual damages or one thousand five hundred dollars ($1,500), whichever is greater.

(2)(A) A person may bring a civil action to enforce a claim under this subsection in an appropriate court of competent jurisdiction.

(B) The action must be brought not later than five (5) years after the claim accrues.

(C) The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

(b) Nothing in this subchapter, however, shall in any way limit any other statutory or common law rights, causes of actions, or remedies which are otherwise available to a person, including, but not limited to, actions for:

(1) Breach of warranty;
(2) Fraud;
(3) Negligent misrepresentation;
(4) Intentional misrepresentation;
(5) Deceptive trade practices actions;
(6) Rescission; or
(7) Revocation of acceptance.

History. Acts 1995, No. 795, §§ 7, 8; 2019, No. 315, § 136.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a)(1).

CASE NOTES

Award Upheld.

There were no genuine issues of material fact remaining where there was a violation of the Arkansas Odometer Fraud Act by failing to have the odometer read the correct mileage or by adjusting it to zero to put buyers on notice; a violation of the Odometer Fraud Act constituted an unfair or deceptive trade practice. The damages for economic loss, treble damages, and attorney's fees were upheld under the Odometer Fraud Act and the Arkansas Deceptive Trade Practices Act. Ukegbu v. Daniels, 2014 Ark. App. 422, 438 S.W.3d 284 (2014).

Subchapter 4 — New Motor Vehicle Quality Assurance Act

SECTION.
4-90-403. Definitions.

4-90-403. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Calendar day" means any day of the week other than a legal holiday;

(2) "Collateral charges" means those additional charges to a consumer wholly incurred as a result of the acquisition of the motor vehicle. For the purposes of this subchapter, collateral charges include, but are not limited to, manufacturer-installed or agent-installed items, earned finance charges, sales taxes, title charges, and charges for extended warranties provided by the manufacturer, its subsidiary, or agent;

(3) "Condition" means a general problem that may be attributable to a defect in more than one (1) part;

(4) "Consumer" means the purchaser or lessee, other than for the purposes of lease or resale, of a new or previously untitled motor vehicle or any other person entitled to enforce the obligations of the warranty during the duration of the motor vehicle quality assurance period, provided the purchaser has titled and registered the motor vehicle as prescribed by law;

(5) "Incidental charges" means those reasonable costs incurred by the consumer, including, but not limited to, towing charges and the costs of obtaining alternative transportation which are directly caused by the nonconformity or nonconformities which are the subject of the claim, but shall not include loss of use, loss of income, or personal injury claims;

(6) "Lease price" means the aggregate of:

(A) The lessor's actual purchase costs;

(B) Collateral charges, if applicable;

(C) Any fee paid to another person to obtain the lease;

(D) Any insurance or other costs expended by the lessor for the benefit of the lease;

(E) An amount equal to state and local sales taxes, not otherwise included as collateral charges, paid by the lessor when the vehicle was initially purchased; and

(F) An amount equal to five percent (5%) of the lessor's actual purchase price;

(7) "Lessee" means any consumer who leases a motor vehicle for one (1) year or more pursuant to a written lease agreement which provides that the lessee is responsible for repairs to the motor vehicle;

(8) "Lessee cost" means the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle;

(9) "Lessor" means a person who holds title to a motor vehicle leased to a lessee under the written lease agreement or who holds the lessor's rights under such agreement;

(10) "Manufacturer" means:

(A) Any person who is engaged in the business of constructing or assembling new motor vehicles or installing on previously assembled vehicle chassis special bodies or equipment which, when installed, form an integral part of the new motor vehicle; or

(B) In the case of motor vehicles not manufactured in the United States, any person who is engaged in the business of importing new motor vehicles into the United States for the purpose of selling or distributing new motor vehicles to new motor vehicle dealers;

(11)(A) "Motor vehicle" or "vehicle" means any self-propelled vehicle licensed, purchased, or leased in this state primarily designed for the transportation of persons or property over the public streets and highways.

(B) "Motor vehicle" or "vehicle" does not include:

(i) Mopeds;

(ii) Motorcycles;

(iii) The living facilities of a motor home;

(iv)*(a)* Vehicles over fourteen thousand pounds (14,000 lbs.) gross vehicle weight rating.

(b) For purposes of this subchapter, the limit of fourteen thousand pounds (14,000 lbs.) gross vehicle weight rating does not apply to motor homes; or

(v) A vehicle over ten thousand pounds (10,000 lbs.) gross vehicle weight rating that has been substantially altered after its initial sale from a dealer to the person;

(12) "Motor vehicle quality assurance period" means a period of time that:

(A) Begins:

(i) On the date of original delivery of a motor vehicle; or

(ii) In the case of a replacement vehicle provided by a manufacturer to a consumer under this subchapter, on the date of delivery of the replacement vehicle to the consumer; and

(B) Ends twenty-four (24) months after the date of the original delivery of the motor vehicle to a consumer, or the first twenty-four thousand (24,000) miles of operation attributable to the consumer, whichever is later;

(13) "Nonconformity" means any specific or generic defect or condition or any concurrent combination of defects or conditions that:

(A) Substantially impairs the use, market value, or safety of a motor vehicle; or

(B) Renders the motor vehicle nonconforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability;

(14) "Person" means any natural person, partnership, firm, corporation, association, joint venture, trust, or other legal entity;

(15) "Purchase price" means the cash price paid for the motor vehicle appearing in the sales agreement or contract, including any net allowance for a trade-in vehicle;

(16) "Replacement motor vehicle" means a motor vehicle which is identical or reasonably equivalent to the motor vehicle to be replaced, as the motor vehicle replaced existed at the time of the original acquisition; and

(17) "Warranty" means any written warranty issued by the manufacturer or any affirmation of fact or promise made by the manufacturer, excluding statements made by the dealer, in connection with the sale or lease of a motor vehicle to a consumer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is free of defects or will meet a specified level of performance.

History. Acts 1993, No. 285, § 3; 1993, No. 297, § 3; 1995, No. 302, § 1; 2001, No. 1134, § 2; 2009, No. 322, § 1; 2009, No. 492, § 1; 2021, No. 92, § 1.

Amendments. The 2021 amendment substituted "fourteen thousand pounds (14,000 lbs.)" for "thirteen thousand pounds (13,000 lbs.)" in (11)(B)(iv)*(a)* and *(b)*.

4-90-404. Notice by consumer — Disclosure by manufacturer, agent, or dealer.

CASE NOTES

Failure to Exhaust.

Failure to exhaust the Informal Dispute Settlement Proceedings (IDSP) options did not preclude a consumer's state-law action for breach of warranty because all the remedies available to him under the Arkansas Lemon Law were not available under the particular IDSP, which contained no language granting the consumer an unconditional right to choose a refund rather than a replacement as he could under subdivision (b)(2)(A) of this section. Ford Motor Co. v. Keatts, 2013 Ark. App. 575 (2013).

4-90-406. Failure to make required repairs.

CASE NOTES

Unconditional Right.

Failure to exhaust the Informal Dispute Settlement Proceedings (IDSP) options did not preclude a consumer's state-law action for breach of warranty because all the remedies available to him under the Arkansas Lemon Law were not available under the particular IDSP, which although allowed for a replacement of vehicle, contained no language granting the consumer an unconditional right to choose a refund rather than a vehicle replacement. Ford Motor Co. v. Keatts, 2013 Ark. App. 575 (2013).

4-90-414. Informal proceeding as precedent.

CASE NOTES

FTC Requirements.

Failure to exhaust the Informal Dispute Settlement Proceedings (IDSP) options did not preclude a consumer's state-law action for breach of warranty because all the remedies available to him under the Arkansas Lemon Law were not available under the particular IDSP, which did not grant the consumer an unconditional right to choose a refund rather than a vehicle replacement, thereby failing to comply with the Federal Trade Commission requirements under 16 C.F.R. § 703.1 et seq. Ford Motor Co. v. Keatts, 2013 Ark. App. 575 (2013).

Subchapter 5 — Motor Vehicle Service Contract Act

4-90-502. Definitions.

As used in this subchapter:

(1) "Affiliate" means an entity that is owned at least fifty-one percent (51%) by the same entity that holds at least fifty-one percent (51%) of the seller of a motor vehicle;

(2) "Commissioner" means the Insurance Commissioner for the State of Arkansas;

(3)(A) "Incidental costs" means expenses specified in a theft protection program warranty that are incurred by the warranty holder due to the failure of a theft protection program to perform as provided in the contract.

(B) "Incidental costs" may include without limitation:

(i) Insurance policy deductibles;

(ii) Rental vehicle charges;

(iii) The difference between the actual value of the stolen motor vehicle at the time of theft and the cost of a replacement motor vehicle;

(iv) Sales tax;

(v) Registration fees;

(vi) Transaction fees; and

(vii) Mechanical inspection fees.

(C) Incidental costs may be reimbursed in either:

(i) A fixed amount specified in the theft protection program warranty; or

(ii) By use of a formula itemizing specific incidental costs incurred by the warranty holder;

(4) "Mechanical breakdown insurance" means a policy, contract, or agreement that undertakes to perform or provide repair or replacement service, or indemnification for such service, for the operational or structural failure of a motor vehicle due to a defect in materials or workmanship or normal wear and tear and that is issued by an insurer that is authorized or approved to transact the business of insurance in this state;

(5) "Motor vehicle" means a vehicle designed for highway use and subject to registration under § 27-14-701 et seq.;

(6)(A) "Motor vehicle service contract" or "service contract" means a contract or agreement given for separate and identifiable consideration that a service contract provider undertakes to perform or provide repair or replacement service, or indemnification for such service, for the operational or structural failure of a motor vehicle or any of its component parts due to a defect in materials or workmanship or normal wear and tear, with or without an additional provision for incidental payment of indemnity under limited circumstances, including without limitation towing, rental vehicle expense, and emergency road service, but does not include mechanical breakdown insurance.

(B) "Motor vehicle service contract" includes a contract that provides any of the following services:

(i) The repair or replacement of tires or wheels on a motor vehicle damaged as a result of coming into contact with road hazards;

(ii) The removal of dents, dings, or creases on a motor vehicle that can be repaired using the process of paintless dent removal without affecting the existing paint finish and without replacing vehicle body panels, sanding, bonding, or painting;

(iii) The repair of chips or cracks in or the replacement of motor vehicle windshields as a result of damage caused by road hazards;

(iv) The replacement of a motor vehicle key or key fob in the event that the key or key fob becomes inoperable or is lost or stolen; or

(v) Other services that may be approved by the commissioner, if not inconsistent with this subchapter;

(7) "Motor vehicle service contract provider" or "provider" means a person who, as the principal or obligor, issues, makes, sells, or offers to sell a motor vehicle service contract;

(8) "Reimbursement insurance policy" means a policy of insurance providing coverage for all obligations and liabilities incurred by a motor vehicle service contract provider or a warrantor under the terms of the motor vehicle service contracts issued or sold by the motor vehicle service contract provider or theft protection program warranties issued by a warrantor;

(9)(A) "Road hazard" means a condition that is encountered while driving a motor vehicle.

(B) "Road hazard" includes without limitation:

(i) Potholes;

(ii) Rocks;

(iii) Wood debris;

(iv) Metal parts;

(v) Glass;

(vi) Plastic;

(vii) Curbs; or

(viii) Composite scraps;

(10) "Service contract holder" or "holder" means a person who purchases a service contract or a permitted transferee;

(11)(A) "Theft protection program" means a device or system that:

(i) Is installed on or applied to a motor vehicle;

(ii) Is designed to prevent loss or damage to a motor vehicle from theft; and

(iii) Includes a theft protection program warranty.

(B) "Theft protection program" includes without limitation:

(i) Alarm systems;

(ii) Body part marking products;

(iii) Steering locks;

(iv) Window etch products;

(v) Pedal and ignition locks;

(vi) Fuel and ignition kill switches; and

(vii) Electronic, radio, and satellite tracking devices.

(C) "Theft protection program" does not include fuel additives, oil additives, or other chemical products that are applied to the engine, transmission, fuel system, or interior or exterior surfaces of a motor vehicle;

(12) "Theft protection program warranty" means a written agreement by a warrantor that provides that if the theft protection program fails to prevent loss or damage to a motor vehicle from theft, the

warrantor shall pay to or on behalf of the warranty holder any specified incidental costs as a result of the failure of the theft protection program to perform under the terms of the theft protection program warranty;

(13) "Warrantor" means a person who is contractually obligated to the warranty holder under the terms of the theft protection program warranty; and

(14) "Warranty holder" means a person who purchases a theft protection program, any authorized transferee or assignee of the purchaser, or any other person legally assuming the purchaser's rights under the theft protection program contract.

History. Acts 1993, No. 805, § 2; 2017, No. 364, § 1.

Amendments. The 2017 amendment substituted "As used in" for "For purposes of" in the introductory language; added the definitions of "Affiliate", "Incidental costs", "Road hazard", "Theft protection program", "Theft protection program warranty", "Warrantor", and "Warranty holder" and redesignated the remaining subdivisions accordingly; in (6)(A), substituted "that" for "pursuant to which", inserted "or any of its component parts", and inserted "with or without . . . emergency road service"; added (6)(B); inserted "motor vehicle" preceding the second occurrence of "service contract" in (7); rewrote (8); and made stylistic changes.

4-90-504. Exemptions — Affiliates.

(a) Except as provided in this subchapter, a motor vehicle service contract provider and warrantor are governed by this subchapter and are exempt from the Arkansas Insurance Code.

(b)(1) This subchapter shall not prohibit or affect the giving, free of charge, of the usual warranties or performance guarantees by manufacturers, distributors, or dealers in connection with the sale of new motor vehicles.

(2) This subchapter shall not apply to a motor vehicle service contract or a theft protection program warranty issued by a motor vehicle manufacturer, distributor, importer, or dealer of motor vehicles, nor shall the requirements of this subchapter apply to any nonrenewable motor vehicle service contract or theft protection program warranty issued for a period of less than six (6) months, if the issuer of the motor vehicle service contract or theft protection program warranty is the entity that sold the motor vehicle to which the motor vehicle service contract or theft protection program warranty applies or is an affiliate of the entity.

History. Acts 1993, No. 805, § 3; 2017, No. 364, § 2.

Publisher's Notes. The Arkansas Insurance Code, referred to in this section, was originally enacted by Acts 1959, No. 148. Acts 1959, No. 148 is codified as set out in the note following § 23-60-101.

Amendments. The 2017 amendment rewrote the section heading; in (a), substituted "provider and warrantor" for "providers" and made stylistic changes; rewrote (b); and deleted (c).

4-90-505. Mandatory insurance.

(a) A motor vehicle service contract or theft protection program warranty shall not be issued, sold, or offered for sale in this state unless a motor vehicle service contract provider or warrantor is insured under a reimbursement insurance policy issued by an insurer authorized to do business in this state, and providing that the insurer will pay on behalf of the motor vehicle service contract provider or warrantor all sums that the motor vehicle service contract provider or warrantor is legally obligated to pay and will guarantee the performance of the motor vehicle service contract provider's or warrantor's obligations undertaken according to the motor vehicle service contract provider's or warrantor's contractual obligations under the service contracts issued or sold by the motor vehicle service contract provider or theft protection program warranties issued by the warrantor.

(b) A policy of insurance shall not be cancelled, terminated, or nonrenewed by the insurer unless a sixty-day written notice has been given to the motor vehicle service contract provider or warrantor before the date of the cancellation, termination, or nonrenewal.

(c) A cancellation, termination, or nonrenewal shall not affect the liability of an insurer to guarantee the performance of a motor vehicle service contract provider or warrantor under the motor vehicle service contracts or theft protection program warranties issued or sold before the effective date of cancellation or termination or nonrenewal.

(d) The insured motor vehicle service contract or theft protection program warranty shall conspicuously state:

(1) That the obligations of a motor vehicle service contract provider to the service contract holder or the obligations of a warrantor to the warranty holder are guaranteed under a reimbursement insurance policy;

(2) The name, address, and telephone number of the issuer of a motor vehicle service contract provider's or warrantor's reimbursement insurance policy; and

(3) The procedure for filing a claim under a motor vehicle service contract or theft protection program warranty directly with a reimbursement insurer.

(e) A reimbursement insurer shall establish and maintain unearned premium reserves and claims reserves for any gross policy obligations under a reimbursement insurance policy, net of reinsurance ceded, that the insurer is entitled to as full reserve credit on its financial statements under this subchapter.

History. Acts 1993, No. 805, § 4; 2017, No. 364, § 3.

Amendments. The 2017 amendment rewrote the section.

4-90-506. Required service contract and warranty disclosures.

A motor vehicle service contract or theft protection program warranty issued or sold for delivery in this state shall contain the following disclosures, as applicable, in a conspicuous and readable manner:

(1) The name and address of the:

(A) Motor vehicle service contract provider and the service contract holder; or

(B) Warrantor and the warranty holder;

(2) The total retail price of the motor vehicle service contract or theft protection program;

(3) The procedure for making a claim under the motor vehicle service contract or theft protection program warranty, including the name, address, and telephone number of any person from whom approval is required before covered repairs may be commenced;

(4) The existence and amount of a deductible, if any;

(5) For motor vehicle service contracts, the motor vehicle parts and components covered under the motor vehicle service contract, and any limitations, exceptions, or exclusions;

(6) The terms, conditions, and restrictions governing transferability of the motor vehicle service contract or theft protection program warranty, if any;

(7) For motor vehicle service contracts, the provisions governing termination and refunds under § 4-90-507; and

(8) A statement that purchase of the motor vehicle service contract or theft protection program is not required in order to purchase or obtain financing for a motor vehicle.

History. Acts 1993, No. 805, § 5; 2017, No. 364, § 4.

Amendments. The 2017 amendment, in the introductory language, substituted "A motor vehicle service contract or theft protection program warranty" for "All motor vehicle service contracts" and inserted "as applicable"; rewrote (1); inserted references to theft protection program and to theft protection program warranty throughout the section; inserted "motor vehicle" preceding "service contract" in (2), (3), (5), and (6); added "For motor vehicle service contracts" in (5) and (7); and made stylistic changes.

4-90-508. [Repealed.]

Publisher's Notes. This section, concerning incidental benefits, was repealed by Acts 2017, No. 364, § 5. The section was derived from Acts 1993, No. 805, § 7.

4-90-509. Rulemaking power.

(a) The Insurance Commissioner may adopt such administrative rules as are necessary to implement the provisions of this subchapter.

(b) The commissioner may promulgate rules providing for the filing with the commissioner of motor vehicle service contract forms by motor vehicle service contract providers and warrantors under § 4-90-504 if rules do not require the approval of the forms by the commissioner before their initial use.

History. Acts 1993, No. 805, §§ 8, 12; 2017, No. 364, § 6.

Amendments. The 2017 amendment, in (b), deleted "and regulations" following "promulgate rules", substituted "motor vehicle service contract providers and warrantors" for "providers authorized" and "if rules do not" for "provided, that any such rules and regulations may not"; and made stylistic changes.

4-90-510. Investigations and enforcement.

(a) The Insurance Commissioner is authorized to conduct such investigations of the motor vehicle service contract and theft protection program business of any motor vehicle service contract provider or warrantor and of any person assisting the motor vehicle service contract provider or warrantor in the conduct of such business as the commissioner may deem necessary.

(b) The commissioner shall have and may exercise all of the powers conferred by § 23-61-103, §§ 23-61-108 — 23-61-110, § 23-61-201(a)(1), §§ 23-61-203 — 23-61-206, and § 23-61-301 et seq. in the conduct of such investigations and in the enforcement of this subchapter and any rules promulgated by the commissioner.

History. Acts 1993, No. 805, § 9; 2017, No. 364, § 7; 2019, No. 315, § 137.

Amendments. The 2017 amendment, in (a), inserted "and theft protection program", substituted "motor vehicle service contract provider or warrantor" for "provider" twice, and made stylistic changes.

The 2019 amendment deleted "and regulations" following "rules" in (b).

4-90-511. Unfair trade practices.

Motor vehicle service contract providers and warrantors are subject to the Trade Practices Act, § 23-66-201 et seq., to the extent such act may be appropriately applied to motor vehicle service contract providers and warrantors given the nature of such contracts.

History. Acts 1993, No. 805, § 10; 2017, No. 364, § 8.

Amendments. The 2017 amendment inserted "and warrantors" twice and substituted "are subject to" for "shall be subject to the provisions of".

4-90-512. Form of service contracts and warranties.

A motor vehicle service contract or theft protection program warranty shall not be issued that:

(1) Is a violation of or does not comply with this subchapter, any specifically applicable provision of the Arkansas Insurance Code, or any applicable rule of the State Insurance Department;

(2) Contains, or incorporates by reference when such incorporation is otherwise permissible, any inconsistent, ambiguous, illusory, or misleading clauses, or exceptions and conditions that deceptively affect the risk purported to be assumed in the general coverage of the motor vehicle service contract;

(3) Has any title, heading, or other indication of its provisions that is misleading;

(4) Is printed or otherwise reproduced in such manner as to render any material provision of the form substantially illegible;

(5) Contains any provision that is unconscionable or encourages misrepresentation;

(6) Contains any provision that makes it difficult to determine the actual motor vehicle service contract provider or warrantor issuing the form; or

(7) Contains any provision for reducing claim payments due to depreciation of parts.

History. Acts 1993, No. 805, § 11; 2017, No. 364, § 9.

Publisher's Notes. The Arkansas Insurance Code, referred to in this section, was originally enacted by Acts 1959, No. 148. Acts 1959, No. 148 is codified as set out in the note following § 23-60-101.

Amendments. The 2017 amendment rewrote the introductory language; in (1), substituted "Is a" for "Is in any respect in" and "State Insurance Department" for "department"; substituted "motor vehicle service contract" for "service agreement" in (2); in (6), inserted "motor vehicle service contract" and "or warrantor"; and made stylistic changes.

Subchapter 8 — Guaranteed Asset Protection Waivers

4-90-801. Legislative intent — Purpose — Scope.

(a) The General Assembly finds that guaranteed asset protection waivers are not insurance.

(b) It is the intent of the General Assembly that all guaranteed asset protection waivers issued in this state, before or after the enactment of this subchapter, are not to be considered insurance.

(c) The purpose of this subchapter is to provide a framework within which guaranteed asset protection waivers are defined and may be offered within this state.

(d) This subchapter does not apply to:

(1) An insurance policy offered by an insurer under the Arkansas Insurance Code and insurance laws of this state; or

(2) A debt cancellation or debt suspension contract being offered in compliance with 12 C.F.R. Part 37 or 12 C.F.R. Part 721 or other applicable federal laws.

(e)(1) Guaranteed asset protection waivers governed under this subchapter are not insurance and are exempt from the insurance laws of this state.

(2) Persons marketing, selling, or offering to sell guaranteed asset protection waivers to borrowers that comply with this subchapter are exempt from this state's insurance licensing requirements.

History. Acts 2019, No. 787, § 1.

Publisher's Notes. The Arkansas Insurance Code, referred to in this section, was originally enacted by Acts 1959, No. 148. Acts 1959, No. 148 is codified as set out in the note following § 23-60-101.

4-90-802. Definitions.

As used in this subchapter:

(1) "Administrator" means a person, other than an insurer or creditor, that performs administrative or operational functions under a guaranteed asset protection waiver program;

(2) "Borrower" means a debtor, retail buyer, or lessee under a finance agreement;

(3) "Creditor" means:

(A) A lender in a loan or credit transaction;

(B) A lessor in a lease transaction;

(C) Any retail seller in a retail installment transaction;

(D) A seller in a commercial retail installment transaction; or

(E) An assignee of any of the above to whom a credit obligation is payable;

(4) "Finance agreement" means a loan, lease, or retail installment sales contract for the purchase or lease of a motor vehicle;

(5) "Free look period" means the period of time, not less than thirty (30) days, from the effective date of the guaranteed asset protection waiver until the date the borrower may cancel the contract without imposition of a penalty, fee, or cost to the borrower;

(6) "Guaranteed asset protection waiver" means a contractual agreement wherein a creditor, for a separate charge, agrees to cancel or waive all or part of the amount due on a borrower's finance agreement with the creditor in the case of a total physical damage loss or unrecovered theft of the motor vehicle, and the contractual agreement is part of or a separate addendum to the borrower's finance agreement;

(7) "Insurer" means an insurance company that is licensed, registered, or otherwise authorized to do business under the insurance laws of this state;

(8) "Motor vehicle" means a self-propelled or towed vehicle designed for personal or commercial use, including without limitation:

(A) An automobile;

(B) A truck;

(C) A motorcycle;

(D) A recreational vehicle;

(E) An all-terrain vehicle;

(F) A snowmobile;

(G) A camper;

(H) A boat;

(I) A personal watercraft;

(J) A motorcycle trailer;
(K) A boat trailer;
(L) A camper trailer; and
(M) A personal watercraft trailer;

(9) "Person" means an individual, company, association, organization, partnership, business trust, corporation, or any other form of legal entity;

(10) "Retail buyer" means a person who buys or agrees to buy a motor vehicle; and

(11) "Retail seller" means a motor vehicle dealer that sells, or offers to sell, a motor vehicle.

History. Acts 2019, No. 787, § 1.

4-90-803. Requirements for offering guaranteed asset protection waivers.

(a) A guaranteed asset protection waiver may be offered, sold, or provided to a borrower in this state under this subchapter.

(b) At the option of the creditor that offers the guaranteed asset protection waiver, a guaranteed asset protection waiver may:

(1) Be sold for a single payment; or

(2) Be offered with a monthly or periodic payment option.

(c) Notwithstanding any other provision of law, any cost to the borrower for a guaranteed asset protection waiver entered into in compliance with the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and its implementing federal regulations, as it existed on January 1, 2019, shall be separately itemized in the finance agreement and is not to be considered a finance charge or interest.

(d)(1) A retail seller shall insure its guaranteed asset protection waiver obligations under a contractual liability or other insurance policy issued by an insurer.

(2) A creditor, other than a retail seller, may insure its guaranteed asset protection waiver obligations under a contractual liability policy or other policy issued by an insurer.

(3)(A) The insurance policy may be directly obtained by a creditor, retail seller, or procured by an administrator to cover a creditor's or retail seller's obligations under the guaranteed asset protection waiver.

(B) A retail seller that is a lessor of motor vehicles and does not assign its finance agreements is not required to insure its obligations related to guaranteed asset protection waivers on its sold or leased vehicles.

(e) The guaranteed asset protection waiver remains a part of the finance agreement upon an assignment, sale, or transfer of the finance agreement by the creditor.

(f) Neither the extension of credit, the term of credit, nor the term of the related motor vehicle sale or lease may be conditioned on the purchase of a guaranteed asset protection waiver.

(g) A creditor that offers a guaranteed asset protection waiver shall report the sale of, and forward funds received on, all waivers to the designated party, if any, as prescribed in any applicable administration services agreement, contractual liability policy, other insurance policy, or other specified program documents.

(h) Moneys received or held by a creditor or administrator and belonging to an insurer, creditor, or administrator, under the terms of a written agreement, shall be held by the creditor or administrator in a fiduciary capacity.

History. Acts 2019, No. 787, § 1.

4-90-804. Contractual liability or other insurance policies.

(a) A contractual liability policy or other insurance policy insuring a guaranteed asset protection waiver shall state the obligation of the insurer to reimburse or pay to the creditor any sums the creditor is legally obligated to waive under the guaranteed asset protection waiver issued by the creditor and purchased or held by the borrower.

(b) Coverage under a contractual liability or other insurance policy insuring a guaranteed asset protection waiver shall also cover any subsequent assignee upon the assignment, sale, or transfer of the finance agreement.

(c) Coverage under a contractual liability or other insurance policy insuring a guaranteed asset protection waiver shall remain in effect unless canceled or terminated in compliance with the applicable insurance laws of this state.

(d) The cancellation or termination of a contractual liability or other insurance policy shall not reduce the insurer's responsibility for guaranteed asset protection waivers issued by the creditor before the date of cancellation or termination and for which a premium has been received by the insurer.

History. Acts 2019, No. 787, § 1.

4-90-805. Disclosures.

A guaranteed asset protection waiver shall disclose, as applicable, in writing and in clear and understandable language that is easy to read, the following:

(1) The name and address of the initial creditor, the borrower at the time of sale, and the identity of any administrator, if different from the initial creditor;

(2) The purchase price and the terms of the guaranteed asset protection waiver, including without limitation the requirements for protection, conditions, or exclusions associated with the guaranteed asset protection waiver;

(3) That the borrower may cancel the guaranteed asset protection waiver within a free look period as specified in the guaranteed asset

protection waiver, and will be entitled to a full refund of the purchase price, so long as no benefits have been provided;

(4) The procedure the borrower has to follow, if any, to obtain guaranteed asset protection waiver benefits under the terms and conditions of the guaranteed asset protection waiver, including a telephone number and address where the borrower may apply for waiver benefits;

(5) Whether or not the guaranteed asset protection is cancelable after the free look period and, if so, the conditions under which it may be canceled or terminated, including the procedures for requesting any refund due;

(6)(A) That in order to receive any refund due in the event of a borrower's cancellation of the guaranteed asset protection waiver agreement or early termination of the finance agreement after the free look period of the guaranteed asset protection waiver, the borrower, according to the terms of the waiver, shall provide a written notice requesting to cancel to the creditor, administrator, or other party.

(B) If the request is being made due to the early termination of the finance agreement, the notice shall be provided to the creditor, administrator, or other party within ninety (90) days of the occurrence of the event terminating the finance agreement;

(7) The methodology for calculating any refund of the unearned purchase price of the guaranteed asset protection waiver due, in the event of cancellation of the guaranteed asset protection waiver or early termination of the finance agreement;

(8) That the extension of credit, the terms of the credit agreement, or the terms of the related motor vehicle sale or lease shall not be conditioned on the purchase of the guaranteed asset protection waiver; and

(9) That the cost of the guaranteed asset protection waiver is not regulated and that the borrower should determine whether the cost of the guaranteed asset protection waiver is reasonable in relation to the protection afforded by the guaranteed asset protection waiver.

History. Acts 2019, No. 787, § 1.

4-90-806. Cancellation of guaranteed asset protection waiver.

(a)(1) A guaranteed asset protection waiver agreement may be cancelable or may not be cancelable after the free look period.

(2) A guaranteed asset protection waiver that is cancelable shall provide that if a borrower cancels a guaranteed asset protection waiver within the free look period, the borrower shall be entitled to a full refund of the purchase price, so long as no benefits have been provided.

(b)(1) Upon a borrower's cancellation of the guaranteed asset protection waiver or early termination of the finance agreement, after the agreement has been in effect beyond the free look period and no benefits have been provided, the borrower shall be entitled to a refund of any

unearned portion of the purchase price of the waiver less any cancellation fee no greater than seventy-five dollars ($75.00) according to the terms of the waiver.

(2) In order to receive a refund, a borrower shall provide a written notice requesting to cancel the guaranteed asset protection waiver to the creditor, administrator, or other party under any applicable terms of the guaranteed asset protection waiver.

(3) If the request is being made due to the early termination of the finance agreement, the notice shall be provided by the borrower to the creditor, administrator, or other party within ninety (90) days of the occurrence of the event terminating the finance agreement.

(c) If the cancellation of the guaranteed asset protection waiver occurs as a result of a default under the finance agreement, the repossession of the motor vehicle associated with the finance agreement, or any other termination of the finance agreement, any refund due may be paid directly to the creditor or administrator and applied as stated in subsection (d) of this section.

(d) A cancellation refund under this section may be applied by the creditor as a reduction of the amount owed under the finance agreement, unless the borrower can show that the finance agreement has been paid in full.

History. Acts 2019, No. 787, § 1.

4-90-807. Commercial transactions — Exemptions.

Section 4-90-803(c), § 4-90-805, and § 4-90-808 shall not apply to a guaranteed asset protection waiver offered in a commercial transaction involving a lease or retail installment sale.

History. Acts 2019, No. 787, § 1.

4-90-808. Enforcement.

(a) The Insurance Commissioner may take action that is necessary or appropriate to enforce this subchapter and to protect guaranteed asset protection waiver holders in this state.

(b) After notice and opportunity for hearing, the commissioner may:

(1) Order the creditor, administrator, or other person that is not complying with this subchapter to cease and desist from further guaranteed asset protection waiver-related operations that are in violation of this subchapter; and

(2)(A) Impose a penalty of no more than five hundred dollars ($500) per violation and a maximum total of no more than ten thousand dollars ($10,000) for all violations of a similar nature.

(B) For purposes of this section, a violation shall be of a similar nature if the violation consists of the same or similar course of conduct, action, or practice, regardless of the number of times the conduct, action, or practice that is determined to be a violation has occurred.

History. Acts 2019, No. 787, § 1.

CHAPTER 91

CREDIT SERVICES ORGANIZATIONS

SUBCHAPTER.

Subchapter 1 — Credit Services Organizations Act of 1987

[Repealed.]

SECTION.

4-91-101 — 4-91-109. [Repealed.]

Publisher's Notes. This subchapter, concerning the "Credit Services Organizations Act of 1987", was repealed by Acts 2017, No. 944, §§ 2-10. The subchapter was derived from the following sources:

4-91-101. Acts 1987, No. 321, § 1.
4-91-102. Acts 1987, No. 321, § 2.
4-91-103. Acts 1987, No. 321, § 8.
4-91-104. Acts 1987, No. 321, § 8; 1991, No. 786, § 1.
4-91-105. Acts 1987, No. 321, § 9.
4-91-106. Acts 1987, No. 321, §§ 3, 4.
4-91-107. Acts 1987, No. 321, § 5.
4-91-108. Acts 1987, No. 321, § 6; 1991, No. 786, § 2.
4-91-109. Acts 1987, No. 321, § 7.

Subchapter 2 — Credit Repair Services Organizations Act of 2017

SECTION.

4-91-201. Title.

This subchapter shall be known and may be cited as the "Credit Repair Services Organizations Act of 2017".

History. Acts 2017, No. 944, § 1.

4-91-202. Definitions — Interest — Statement Required — Contracts — Prohibited Conduct.

(a) As used in this subchapter:

(1) "Buyer" means a person or entity that has received credit in a loan transaction and is obligated to repay the loan amount;

(2) "Consumer" means an individual who is solicited to purchase or who purchases the services of a credit services organization;

(3)(A) "Credit repair services organization" means a person or entity that, with respect to the extension of credit by others, sells, provides, performs, or represents that the person or entity will sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services:

(i) Improve a buyer's credit record, history, or rating;

(ii) Obtain an extension of credit for a buyer;

(iii) Locate an independent, unaffiliated third-party lender for a buyer;

(iv) Obtain an installment loan from an independent third-party lender; or

(v) Provide advice or assistance to a buyer with regard to subdivision (3)(A)(i), subdivision (3)(A)(ii), or subdivision (3)(A)(iii) of this section.

(B) "Credit repair services organization" does not include:

(i) A person or entity authorized to make loans under state or federal law, if the person or entity is:

(a) Subject to regulation and supervision by a state or federal regulatory agency; or

(b) A lender approved by the United States Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act, 12 U.S.C. § 1701 et seq.;

(ii) A bank, trust company, savings bank, building and loan association, savings and loan company or association, or credit union, authorized to do business under state or federal laws relating to financial institutions, the accounts of which are insured by the Federal Deposit Insurance Corporation, the National Credit Union Administration, or their operating subsidiaries;

(iii) A nonprofit corporation that qualifies as a nonprofit entity under § 501(c)(3) of the Internal Revenue Code;

(iv) A licensed real estate agent or broker who is performing those activities subject to the regulation of the Arkansas Real Estate Commission;

(v) A licensed collection agency that is performing those activities subject to the regulation of the State Board of Collection Agencies;

(vi) An attorney licensed in Arkansas rendering legal services to his or her client, when the conduct that would subject the attorney to the jurisdiction of this section is ancillary to the provision of the legal services offered;

(vii) A person doing business under the laws of this state or the United States relating to any broker-dealer or commodity futures commission merchant or commodity trading advisor or agent registered and regulated by the State Securities Department or the United States Commodity Futures Trading Commission; or

(viii) A consumer reporting agency as defined in 15 U.S.C. § 1681a(f), as it existed on January 1, 2017;

(4) "Extension of credit" means the right, offered or granted primarily for personal, family, or household purposes, to defer payment of debt or to incur debt and defer its payment;

(5) "Lender" means a person or entity engaged in the business of making loans to buyers through a credit services organization; and

(6)(A) "Loan" means an advance of funds or moneys that is conditioned on the obligation of a person or entity to repay the funds or moneys under a loan agreement, note, contract, or other instrument or document evidencing the indebtedness.

(B) "Loan" includes payments for interest, expenses, and charges incurred with the making of the loan.

(b)(1) The maximum rate of interest provided by § 4-57-104 applies to a loan obtained under this section.

(2) Any amount paid or payable to a credit repair services organization under a loan obtained under this section that exceeds the amount provided by the lender to the buyer in connection with a loan shall be included as interest for purposes of § 4-57-104.

(c)(1) Before the execution of a contract or agreement between the buyer and a credit repair services organization or before the receipt by the credit repair services organization of any money or other valuable consideration, whichever occurs first, the credit repair services organization shall provide the buyer with a statement in writing containing:

(A) A complete and accurate statement of the buyer's right to review any file on the buyer that is maintained by any consumer reporting agency, as provided under the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t;

(B) A statement that the buyer may review his or her consumer reporting agency file at no charge if a request is made to the consumer reporting agency within thirty (30) days after receiving notice that credit has been denied;

(C) The approximate price the buyer will be charged by the consumer reporting agency to review his or her consumer reporting agency file;

(D) A complete and accurate statement of the buyer's right to dispute the completeness or accuracy of any item contained in any file on the buyer maintained by any consumer reporting agency;

(E) A complete and detailed description of the services to be performed by the credit repair services organization for the buyer and the total amount the buyer will have to pay, or become obligated to pay, for the services;

(F) A statement asserting the buyer's right to proceed against the bond or trust account required under subdivision (e)(1) of this section; and

(G) The name and address of the surety company that issued the bond or the name and address of the depository and the trustee and the account number of the trust account.

(2) The credit repair services organization shall maintain on file for a period of two (2) years an exact copy of the statement, personally signed by the buyer, acknowledging receipt of a copy of the statement.

(d)(1) A contract or agreement governing a credit repair services organization transaction or extension of credit shall:

(A) Be in writing;

(B)(i) Prominently disclose the annual percentage rate applicable to the loan transaction.

(ii) The annual percentage rate shall be included in bold 20-point type and Arial font surrounded by a 1.5 point rectangle, as follows:

"APR . %"

(C) Provide a conspicuous statement in boldface type, in immediate proximity to the space reserved for the signature of the buyer, as follows:

"You, the Buyer, may cancel this contract at any time before midnight of the fifth day after the date of the transaction. See the attached notice of cancellation form for an explanation of this right";

(D) Disclose the terms and conditions of payment, including the total of all payments to be made by the buyer, whether to the credit repair services organization or to some other person;

(E) Provide a full and detailed description of the services to be performed by the credit repair services organization for the buyer, including all guarantees and all promises of full or partial refunds, and the estimated date by which the services are to be performed or the estimated length of time for performing the services; and

(F) Provide the credit repair services organization's principal business address and the name and address of its agent in this state authorized to receive service of process.

(2) The contract shall be accompanied by a completed form in duplicate, captioned "Notice of Cancellation", that shall be attached to the contract, be easily detachable, and contain in boldface type the following statement written in the same language as used within the contract:

"Notice of Cancellation: Buyer may cancel this contract without any penalty or obligation within five (5) days from the date the contract is signed. If Buyer cancels this contract, any payment made by Buyer under this contract will be returned within ten (10) days following receipt by the Seller of Buyer's cancellation notice. To cancel this contract, mail or deliver a signed dated copy of this cancellation notice or any other written notice to (name of seller) at (address of seller) (place of business) not later than midnight (date). I hereby cancel this transaction, (date) (purchaser's signature)."

(3) The credit repair services organization shall give to the buyer a copy of the completed contract and all other documents the credit services organization requires the buyer to sign at the time of the cancellation of the contract.

(e) A credit repair services organization, its salespersons, agents, and representatives, and independent contractors who sell or attempt to sell the services of a credit repair services organization shall not:

(1) Charge or receive any money or other valuable consideration before complete performance of the services the credit repair services

organization has agreed to perform for the buyer unless the credit repair services organization:

(A) Obtains a surety bond of ten thousand dollars ($10,000) issued by a surety company having a right to do business in this state; and

(B) Establishes a trust account at a state or national bank or savings and loan association in this state, if the funds deposited into the trust account are federally insured;

(2) Charge or receive any money or other valuable consideration solely for referral of the buyer to a lender that may extend credit to the buyer if the credit that is extended to the buyer is upon substantially the same terms as those available to the general public;

(3) Make, counsel, or advise a buyer to make any statement concerning a buyer's credit worthiness, credit standing, or credit capacity that is untrue or misleading or that should be known by the exercise of reasonable care to be untrue or misleading to a credit reporting agency or to a person who has extended credit to a buyer or to whom a buyer is applying for an extension of credit; or

(4) Make or use any untrue or misleading representations in the offer or sale of the services of a credit repair services organization or engage, directly or indirectly, in any act, practice, or course of business that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a credit repair services organization.

(f)(1) A waiver by a buyer of any part of this subchapter is void.

(2) An attempt by a credit repair services organization to have a buyer waive rights given by this subchapter is a violation of this subchapter.

(g) In any proceeding involving this subchapter, the burden of proving an exemption or an exception from a definition described in this subchapter is upon the person claiming it.

(h) A violation of this section is:

(1) A deceptive and unconscionable trade practice under § 4-88-107; and

(2) Subject to the penalties, remedies, and enforcement provided by § 4-88-101 et seq.

History. Acts 2017, No. 944, § 1.

CHAPTER 92

RENTAL PURCHASES

SECTION.

4-92-108. Personal property — Repossessed rental merchandise.

(a) This section applies when merchandise becomes attached to the personal property of the consumer that is subject to a perfected lien of a secured creditor while the merchandise is being leased from a lessor under a rental-purchase agreement.

(b)(1) If a secured creditor has a security interest in the personal property of a consumer and the merchandise has become attached to that consumer's personal property, and a lessor repossesses the merchandise attached to the consumer's personal property before the consumer becomes the owner of such merchandise, then at the time of repossession the lessor shall install substitute new or used factory quality equipment that is reasonably calculated to keep the personal property of the consumer usable and operable.

(2) A lessor is liable to a secured creditor for the cost and installation of the substitute equipment if a lessor does not comply with subdivision (b)(1) of this section at the time of repossession.

(c) If a secured creditor repossesses the collateral of the secured creditor before the consumer becomes the owner of the merchandise that is attached to the collateral and before the collateral is resold, then the secured creditor shall:

(1) Work with the lessor to comply with subdivision (b)(1) of this section; or

(2) Pay the lessor whichever is the lesser amount:

(A) The original cost of the merchandise; or

(B) The total of remaining rental payments on the consumer's rental purchase agreement with the lessor.

History. Acts 2019, No. 865, § 1.

CHAPTER 96

FARM MACHINERY

SUBCHAPTER.

3. Arkansas New Farm Machinery Quality Assurance Act.

Subchapter 3 — Arkansas New Farm Machinery Quality Assurance Act

SECTION.

4-96-301. Title.
4-96-302. Definitions.
4-96-303. Disclosure by seller.
4-96-304. Right to repair.
4-96-305. Refund or replacement.
4-96-306. Affirmative defenses.
4-96-307. Enforcement — Exclusivity — Costs and expenses.
4-96-308. Action — Limitations.

4-96-301. Title.

This subchapter shall be known and may be cited as the "Arkansas New Farm Machinery Quality Assurance Act".

History. Acts 2019, No. 588, § 1.

4-96-302. Definitions.

As used in this subchapter:

(1) "Authorized dealer" means an individual, corporation, or limited liability company authorized by the manufacturer or distributor to sell, barter, or exchange a particular make of new farm machinery;

(2) "Collateral charges" means any reasonable additional charge to a consumer not directly attributable to the aggregate purchase price of the farm machinery;

(3) "Comparable farm machinery" means an identical or reasonable replacement piece of farm machinery;

(4) "Consumer" means a purchaser or lessee of new farm machinery, other than for purposes of resale, or a person entitled to enforce the obligations of the warranty during the duration of the farm machinery quality assurance period;

(5)(A) "Farm machinery" means self-propelled equipment or machinery typically used for agricultural purposes that is purchased or leased for the first time from a manufacturer, distributor, or an authorized dealer.

(B) "Farm machinery" includes farm machinery propelled by power other than physical power if the farm machinery is not an off-road vehicle, an all-terrain vehicle, as defined under § 27-21-102, equipment under twenty-five horsepower (25 h.p.), lawn tractors, or lawn mowers;

(6) "Farm machinery quality assurance period" means a period of time that:

(A) Begins:

(i) On the date of original delivery of farm machinery; or

(ii) In the case of a replacement piece of farm machinery provided by a manufacturer to a consumer under this subchapter, on the date of delivery of the replacement vehicle to the consumer; and

(B) Ends twelve (12) months after the date of the original delivery of the farm machinery to a consumer, or the first six hundred (600) hours of operation attributable to the consumer, whichever is earlier;

(7) "Nonconformity" means any condition of farm machinery that:

(A) Does not conform with the terms of an express warranty issued by a manufacturer to a consumer;

(B) Significantly impairs the use, value, or safety of the farm machinery; and

(C) Does not arise or occur as a result of abuse or neglect, including without limitation failure to operate and maintain the farm machinery according to the manufacturer's operator manual and recommended maintenance of the farm machinery;

(8) "Reasonable allowance for consumer use" means an amount attributable to use by a consumer:

(A) Before the consumer's first report of the nonconformity to the manufacturer or authorized dealer of the farm machinery;

(B) During any period of use of the farm machinery subsequent to the first report of nonconformity if the farm machinery is not out of service by reason of repair of the reported nonconformity; and

(C) Of the farm machinery provided by the manufacturer or its authorized dealer while the farm machinery is out of service by reason of repair of the reported nonconformity, but not less than the fair lease value of the farm machinery;

(9) "Seller" means a retail seller of the farm machinery as evidenced by the purchase order or lease agreement, that may be a dealer, distributor, manufacturer, or manufacturer's agent; and

(10)(A) "Warranty" means a written warranty, as labeled, issued by a manufacturer of new farm machinery or an affirmation of fact or promise made by the manufacturer, including any terms or conditions precedent to the enforcement of obligations under that warranty in connection with the sale or lease of farm machinery to a consumer concerning the nature of the material or workmanship that affirms or promises that the material or workmanship is free of defects or will meet a specified level of performance.

(B) "Warranty" does not include a statement or expression made by an authorized dealer.

History. Acts 2019, No. 588, § 1.

4-96-303. Disclosure by seller.

(a)(1) When a consumer purchases or leases farm machinery from a seller, the seller shall at the time of purchase or lease transaction:

(A) Provide to the consumer a written statement that adequately discloses and explains the rights and obligations of a consumer under this subchapter;

(B) Obtain a signed acknowledgment from the consumer of the receipt of the written statement described in subdivision (a)(1)(A) of this section; and

(C) For self-propelled farm machinery, maintain copies of the consumer's signed acknowledgment for at least the period equal to the term of coverage of the manufacturer's warranty.

(2) It is a violation of this subchapter for a seller to fail to provide to a consumer the written statement required under subdivision (a)(1)(A) of this section.

(b)(1) The Consumer Protection Division of the office of the Attorney General shall prepare and make available, in either print or by electronic form, a written statement as described in subdivision (a)(1)(A) of this section that includes the telephone number of the division that the consumer can call to obtain information regarding his or her rights and obligations under this subchapter.

(2) It is a violation of this subchapter for a seller to fail to provide to a consumer the written statement described in subdivision (b)(1) of this section.

(c) For each failure of the seller to provide to a consumer the written statement required under this section or failure to retain a signed acknowledgement form, the seller shall be liable to the state for a civil penalty of not less than twenty-five dollars ($25.00) but no more than one thousand dollars ($1,000).

(d)(1) A seller shall clearly and conspicuously disclose to the consumer that written notice of a nonconformity is required before the buyer may be eligible for a refund or replacement of the farm machinery.

(2) At the time of acquisition of farm machinery, a seller shall provide the consumer with conspicuous notice of the address and phone number for the manufacturer, distributor, or authorized dealer at the time of acquisition of farm machinery to which the buyer shall send notification of a nonconformity.

(e)(1) If farm machinery does not conform to any applicable express warranties and the consumer provides written notice by certified mail to the manufacturer, distributor, or authorized dealer demanding correction or repair of the nonconformity during the term of the express warranty or during the farm machinery quality assurance period, whichever period expires earlier, the manufacturer, agent of a manufacturer, distributor, or an authorized dealer shall make any necessary repairs to conform the farm machinery to the express warranties, notwithstanding the fact that the repairs are made after the expiration of the term of the express warranty or farm machinery quality assurance period.

(2) For self-propelled farm machinery, this section is limited to warranty coverage for the engine, transmission, and power train.

(f) This subchapter applies to farm machinery sold on or after January 1, 2020.

History. Acts 2019, No. 588, § 1.

4-96-304. Right to repair.

After notice is provided under § 4-96-303, a manufacturer, a distributor, or an authorized dealer shall have the right to repair a nonconformity of farm machinery:

(1)(A) Three (3) times for the same repair issue or thirty (30) days out of service for the same issue under this subchapter.

(B) The cost of three (3) repairs shall equal at least thirty percent (30%) of the total purchase price of the farm machinery in order to trigger recourse under this subchapter; or

(2)(A) Five (5) times for all issues or sixty (60) days of out of service time.

(B) The cost of five (5) repairs under subdivision (2)(A) of this section shall be equal to at least fifty percent (50%) of the total

purchase price of the farm machinery in order to trigger recourse under this subchapter.

(C) Days of out of service time do not count for the purposes of subdivision (1)(A) of this section if the authorized dealer provides comparable farm machinery.

History. Acts 2019, No. 588, § 1.

4-96-305. Refund or replacement.

(a) If a manufacturer, an agent of a manufacturer, a distributor, or an authorized dealer does not conform farm machinery to the warranty as required under § 4-96-303, after notice of the nonconformity under § 4-96-303 by repairing or correcting one (1) or more nonconformities that substantially impair the farm machinery after a reasonable number of attempts, then, within thirty (30) days, the manufacturer or distributor shall:

(1) At the time of receipt of payment of a reasonable offset for use by the consumer, replace the farm machinery with comparable farm machinery acceptable to the consumer; or

(2) Repurchase the farm machinery from the buyer or lessor and refund to the buyer or lessor the full purchase price or lease price, less:

(A) A reasonable allowance for consumer use; and

(B) A reasonable offset for physical damage sustained by the farm machinery while under the ownership of the consumer.

(b) The replacement or refund under subsection (a) of this section shall include payment of all collateral charges and reasonably incurred incidental charges.

(c) A buyer has an unconditional right to choose a refund rather than a replacement under this subchapter.

(d) At the time of the refund or replacement, a consumer, lien holder, or lessor shall furnish clear title to and possession of the farm machinery to the manufacturer, distributor, or authorized dealer.

(e) The amount of reasonable allowance for consumer use is determined by the fair lease value of the farm machinery.

History. Acts 2019, No. 588, § 1.

4-96-306. Affirmative defenses.

It is an affirmative defense to a claim under this subchapter that:

(1) A defect or condition does not substantially impair the use, value, or safety of the farm machinery;

(2) A nonconformity is the result of an accident, abuse, neglect, or unauthorized modification or alteration of the farm machinery by a person other than the manufacturer, agent of a manufacturer, distributor, or an authorized dealer;

(3) A claim by the consumer was not filed in good faith; or

(4) There are other defenses allowed by law that may be raised against the claim.

History. Acts 2019, No. 588, § 1; 2021, No. 465, § 1.

Amendments. The 2021 amendment substituted "There are other defenses" for "If there are any other defenses" in (4).

4-96-307. Enforcement — Exclusivity — Costs and expenses.

(a) A consumer may bring a civil action to enforce this subchapter in a court of competent jurisdiction.

(b) This subchapter does not limit the rights and remedies that are otherwise available to a consumer under any applicable law.

(c)(1) A consumer who prevails in a legal proceeding under this subchapter is entitled to recover, as part of the judgment, a sum equal to the aggregate amount of costs and expenses, including attorney's fees.

(2) The attorney's fees shall be:

(A) Based on actual time expended by the attorney; and

(B) Based on charges reasonably incurred by the consumer for or in connection with the commencement and prosecution of the action as determined by the court.

History. Acts 2019, No. 588, § 1.

4-96-308. Action — Limitations.

(a) A legal action brought under this subchapter shall commence within two (2) years following the date a buyer first reports the nonconformity to a manufacturer, an agent of a manufacturer, a distributor, or an authorized dealer.

(b)(1) Before filing a legal action in court concerning the enforcement of the rights and remedies available to the consumer under this subchapter, the consumer and the manufacturer, distributor, or authorized dealer shall, in good faith, attempt to resolve all issues and claims in dispute through the use of an impartial, third-party mediator certified by the Arkansas Alternative Dispute Resolution Commission, if the seller has provided the required disclosures under § 4-96-303.

(2) The consumer and the manufacturer shall equally bear all costs and expenses of mediation, unless agreed otherwise.

(3) However, if the seller has not provided the required disclosure under § 4-96-303, the consumer is not required to utilize mediation before commencement of any legal action to enforce the consumer's rights under this subchapter.

History. Acts 2019, No. 588, § 1.

CHAPTER 97

RETAIL PET STORES

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled 'Funding and classification of cabinet-level department secretaries' and 'Transformation and Efficiencies Act transition team' should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019."

4-97-103. Definitions.

For the purposes of this chapter:

(1) "Animal" means a dog or cat of any age;

(2) "Authorized person" means the Secretary of the Department of Health or his or her delegate, or any law enforcement officer;

(3) "Cattery" means an enterprise wherein or whereon the business of grooming or boarding cats, or breeding cats for sale, and selling those cats, is carried on, and which does not in its usual course of business acquire cats for resale to the public;

(4) "Consumer" means any individual purchasing an animal from a retail pet store. A retail pet store shall not be considered a consumer;

(5) "D.V.M." means a person who has graduated from an accredited school of veterinary medicine or has received equivalent formal education, and who has a valid license to practice veterinary medicine within the State of Arkansas;

(6) "Director" means the Director of the Department of Health;

(7) "Euthanasia" means the humane killing of an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death, and administered by a licensed veterinarian or a euthanasia technician licensed by the United States Drug Enforcement Administration and certified by the Department of Health;

(8) "Kennel" means an enterprise wherein or whereon the business of grooming or boarding dogs, or breeding dogs for sale, and selling such dogs, is carried on, and which does not in its usual course of business acquire dogs for resale to the public;

(9) "Person" means any individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or other legal entity;

(10) "Records" of a retail pet store means:

(A) The permanent record of each animal's health history showing the animal's vaccinations, inoculations, wormings, and other veterinary medical procedures performed on that animal; and

(B) The permanent journal giving a perpetual, sequential listing of animals which are kept at the retail pet store for thirty (30) days or longer. The journal shall contain the animal's identifying number, arrival date, exit date, and disposition; and

(11)(A) "Retail pet store" means any room or group of rooms, run, cage, compartment, exhibition pen, or tether, any part of which is within the State of Arkansas, wherein any animal is sold or kept, displayed, or offered for sale, to the public. It excludes kennels and catteries which sell animals directly to consumers. Also excluded are duly authorized animal shelters and duly incorporated humane societies dedicated to the care of unwanted animals which make those animals available for adoption, whether or not a fee for such adoption is charged.

(B) As used in this chapter, the term "retail pet store" includes its owners, officers, agents, operators, managers, and employees, and refers to any such enterprise whether in fact registered or not.

History. Acts 1991, No. 1225, § 3; 2019, No. 910, § 4829.

Amendments. The 2019 amendment substituted "Secretary of the Department of Health" for "Director of the Department of Health" in (2).

4-97-106. Public health — Enforcement.

The State Board of Health may propose, adopt, promulgate, and enforce, in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., such additional rules and standards as may be necessary to carry out the intent of this chapter.

History. Acts 1991, No. 1225, § 6; 2019, No. 315, § 138.

Amendments. The 2019 amendment deleted "regulations" following "rules".

4-97-107. Unlawful disposition of animals.

(a) It is unlawful for a retail pet store to knowingly give, sell, exchange, barter, or otherwise transfer an animal to any other person if the ultimate destination of the animal is research or killing for dissection.

(b) It is unlawful for a retail pet store to kill any animal in its care, custody, or control without a prior written or oral recommendation from a doctor of veterinary medicine citing the animal's interest justifying the killing of the animal.

(c) It is unlawful for a retail pet store, its owners, officers, agents, operator, manager, or employees, or any other person, to kill any animal in its care, custody, or control by any means other than euthanasia as defined in § 4-97-103.

(d) A violation of this chapter or a rule promulgated hereunder shall constitute a Class A misdemeanor.

History. Acts 1991, No. 1225, § 7; 2019, No. 315, § 139.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (d).

CHAPTER 99

REGULATION OF TELEPHONIC SELLERS

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

Effective Dates. Acts 2017, No. 728, § 8: Jan. 1, 2018.

4-99-103. Definitions.

As used in this chapter:

(1) "Caller identification service" means a service offered by a telecommunications provider that provides caller identification information to a device capable of displaying the information;

(2) [Repealed.]

(3) "Item" means any goods and services and includes coupon books which are to be used with businesses other than the seller's business;

(4) "Owner" means a person who owns or controls ten percent (10%) or more of the equity of or otherwise has claim to ten percent (10%) or more of the net income of a telephonic seller;

(5) "Person" includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity;

(6) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person;

(7) "Purchaser" or "prospective purchaser" means a person who is solicited to become or does become obligated to a telephonic seller;

(8) "Salesperson" means any individual employed, appointed, or authorized by a telephonic seller, whether referred to by the telephonic

seller as an "agent", "representative", or "independent contractor", who attempts to solicit or solicits a sale on behalf of the telephonic seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of the telephonic seller; and

(9) "Telephonic seller" or "seller" means a person who on his or her own behalf or through salespersons causes a telephone solicitation or attempted telephone solicitation to occur which meets the criteria specified in subdivision (9)(A) or subdivision (9)(B) of this section, and who is not exempted by subdivision (9)(C) of this section, as follows:

(A) A telephone solicitation or attempted telephone solicitation wherein the telephonic seller initiates telephonic contact with a prospective purchaser and represents or implies one (1) or more of the following:

(i) That a prospective purchaser who buys one (1) or more items will also receive additional or other items, whether or not of the same type as purchased, without further cost. For purposes of this subdivision (9)(A)(i), "further cost" does not include actual postage or common carrier delivery charges, if any;

(ii) That a prospective purchaser will receive a prize or gift if the person also encourages the prospective purchaser to do either of the following:

(a) Purchase or rent any goods or services; or

(b) Pay any money, including, but not limited to, a delivery or handling charge;

(iii) That a prospective purchaser is able to obtain any item or service at a price which the seller states or implies is below the regular price of the item or service offered. This subdivision (9)(A)(iii) shall not apply to retailers who within the previous twelve (12) months have sold a majority of their goods or services through in-person sales at retail stores;

(iv) That the seller is a person other than the person he or she is; or

(v) That the items for sale are manufactured or supplied by a person other than the actual manufacturer or supplier;

(B)(i) A solicitation or attempted solicitation which is made by telephone in response to inquiries generated by unrequested notifications sent by the seller to persons who have not previously purchased goods or services from the seller or who have not previously requested credit from the seller to a prospective purchaser wherein the seller represents or implies to the recipient of the notification that any of the following applies to the recipient:

(a) That the recipient has in any manner been specially selected to receive the notification or the offer contained in the notification;

(b) That the recipient will receive a prize, gift, or award if the recipient calls the seller; or

(c) That, if the recipient buys one (1) or more items from the seller, the recipient will also receive additional or other items, whether or not of the same type as purchased, without further cost or at a cost

which the seller states or implies is less than the regular price of such items.

(ii) This subdivision (9)(B) does not apply to the solicitation of sales by a catalogue seller who periodically issues and delivers catalogues to potential purchasers by mail or by other means. This exception only applies if the catalogue includes a written description or illustration and the sales price of each item or merchandise offered for sale includes at least twenty-four (24) full pages of written material or illustrations, is distributed in more than one (1) state, and has an annual circulation of no fewer than two hundred fifty thousand (250,000) customers; and

(C) As used in this chapter, "telephonic seller" or "seller" does not include any of the following:

(i) A person offering or selling a security and who is registered pursuant to § 23-42-301 et seq.;

(ii) A person offering or selling insurance and who is licensed pursuant to § 23-64-201 et seq.;

(iii) A person primarily soliciting the sale of a newspaper of general circulation, a magazine, or membership in a book or record club whose program operates in conformity with § 4-89-101 et seq. and the Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act, § 4-95-101 et seq.;

(iv) A person soliciting business from prospective purchasers who have previously purchased from the business enterprise for which the person is calling;

(v)*(a)* A person soliciting without the intent to complete and who does not complete the sales presentation during the telephone solicitation but completes the sales presentation at a later face-to-face meeting between the solicitor and the prospective purchaser.

(b) However, if a seller, directly following a telephone solicitation, causes an individual whose primary purpose it is to go to the prospective purchaser to collect the payment or deliver any item purchased, this exemption does not apply;

(vi) Any supervised financial institution or parent, subsidiary, or affiliate thereof. As used in this subdivision (9)(C)(vi), "supervised financial institution" means any commercial bank, trust company, savings and loan association, credit union, industrial loan company, personal property broker, consumer finance lender, commercial finance lender, or insurer, provided that the institution is subject to the supervision of an official or agency of this state or of the United States;

(vii) Any burial association operating pursuant to the authority of § 23-78-101 et seq.;

(viii) A person or an affiliate of a person whose business is regulated by the Arkansas Public Service Commission;

(ix) An issuer or a subsidiary of an issuer that has a class of securities which is subject to and which is either registered or exempt from registration under § 23-42-401 et seq.;

(x) A person soliciting a transaction regulated by the United States Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the United States Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. § 1 et seq., and the registration or license has not expired or been suspended or revoked; or

(xi) A person soliciting a transaction directed to a purchaser holding a permit pursuant to the Arkansas Gross Receipts Act of 1941, § 26-52-101 et seq., and in which the solicitation deals with goods of a type that are subject to resale by the purchaser.

History. Acts 1993, No. 137, §§ 2, 3; 1995, No. 440, § 1; 2003, No. 1465, § 3; 2017, No. 728, § 1.

Amendments. The 2017 amendment repealed (2).

Effective Dates. Acts 2017, No. 728, § 8: Jan. 1, 2018.

4-99-104. Registration procedures — Fees — Duration.

(a)(1) Not less than ten (10) days before doing business in this state, a telephonic seller shall register with the Secretary of State by filing the information required by this chapter and a filing fee of one hundred dollars ($100).

(2) A seller shall be deemed to do business in this state if the seller solicits prospective purchasers from locations in this state or solicits prospective purchasers who are located in this state.

(b) Registration of a telephonic seller shall be valid for one (1) year from the effective date thereof and may be renewed by making the filing required by this chapter and paying a filing fee of one hundred dollars ($100).

(c) The information required by this chapter shall be submitted on a form prescribed by the Secretary of State and shall be verified by a declaration signed by each principal of the telephonic seller under penalty of perjury.

(d)(1) Except as provided in subdivision (d)(2) of this section and before expiration of a seller's annual registration, if there is a material change in the information required under this chapter, the seller shall, within ten (10) days, file an addendum updating the information with the Secretary of State.

(2) Changes in salespersons soliciting on behalf of a seller shall be updated in quarterly intervals computed from the effective date of registration.

(e)(1) Upon receipt of a filing and filing fee under subsection (a) or subsection (b) of this section, the Secretary of State shall send the telephonic seller a written confirmation of registration.

(2) If the seller has more than one (1) business location, the confirmation of registration shall be sent to the principal business location identified in the seller's filing in sufficient number so that the seller has a confirmation of registration for each location to be displayed in a

conspicuous place at each of the seller's business locations and available for inspection by any governmental agency at each location.

(3) Until confirmation of registration is received and posted, the seller shall post in a conspicuous place at each of the seller's business locations within this state a copy of the first page of the registration form sent to the Secretary of State.

(f)(1) Every salesperson shall be employed in a principal-agent relationship by a telephonic seller registered under this chapter and shall, within seventy-two (72) hours after accepting such employment, register with the Secretary of State.

(2) An application for registration shall be on a form prescribed by the Secretary of State, verified by a declaration signed by each salesperson under penalty of perjury, and shall be accompanied by a fee in the sum of ten dollars ($10.00).

(3) When effective, the registration shall be for a period of one (1) year and may be renewed upon the payment of the fee prescribed in this section for additional one-year periods.

(g) All fees collected by the Secretary of State under this section shall be deposited into the State Treasury as general revenues.

History. Acts 1993, No. 137, § 4; 2017, No. 728, § 2.

Amendments. The 2017 amendment substituted "Secretary of State" for "Consumer Protection Division of the Office of the Attorney General" in (a)(1); substituted "Secretary of State" for "Attorney General" in (c), (f)(2), and (g); redesignated (d) as (d)(1) and (2); in (d)(1), substituted "Except as provided in subdivision (d)(2) of this section and before" for "Whenever, prior to" and inserted "if"; substituted "Secretary of State" for "division" in (d)(1), (e)(1), (e)(3), and (f)(1); deleted "However" at the beginning of (d)(2); and made stylistic changes.

Effective Dates. Acts 2017, No. 728, § 8: Jan. 1, 2018.

4-99-105. Filing information.

Each registration filing pursuant to this chapter shall contain the following information:

(1) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different from the name of the seller, and the name of any parent or affiliated organization that will engage in business transactions with purchasers relating to sales solicited by the seller, or that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller;

(2) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto, or, if a partnership, a copy of the partnership agreement, or, if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to subdivision (1) of this section;

(3)(A) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business.

(B) If the principal business location of the seller is not in this state, then the seller shall also designate which of any locations within this state is its main location in the state;

(4) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located;

(5) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities;

(6) The complete address of the principal residence, the date of birth, and the Social Security number of each of the persons whose names are disclosed pursuant to subdivision (5) of this section;

(7) A list of the names and principal residence addresses of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while soliciting;

(8) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers or, if no sales script is required to be used, a statement to that effect;

(9) A copy of all sales information and literature, including, but not limited to, scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium award information provided by the telephonic seller to salespersons, or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser;

(10) If the telephonic seller represents or implies, or directs salespersons to represent or imply, to purchasers that the purchaser will receive certain specific items, including a certificate of any type which the purchaser must redeem to obtain the item described in the certificate, or one (1) or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, awards, or otherwise, the filing shall include the following:

(A) A list of the items offered;

(B) The value or worth of each item described to prospective purchasers and the basis for the valuation;

(C) The price paid by the telephonic seller to its supplier for each of these items and the name, address, and telephone number of each item's supplier;

(D) If the purchaser is to receive fewer than all of the items described by the seller, the filing shall include the following:

(i) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(ii) The odds a single prospective purchaser has of receiving each described item; and

(iii) The name and address of each recipient who has, during the preceding twelve (12) months, or if the seller has not been in business

that long, during the period the telephonic seller has been in business, received the item having the greatest value and the item with the smallest odds of being received; and

(E) All state rules, federal rules or regulations, terms, and conditions a prospective purchaser must meet in order to receive the item; and

(11) The name and address of the telephonic seller's agent in this state, other than the Secretary of State, authorized to receive service of process in this state.

History. Acts 1993, No. 137, § 6; 2017, No. 728, § 3; 2019, No. 315, § 140.

Amendments. The 2017 amendment substituted "Secretary of State" for "Attorney General" in (11).

The 2019 amendment substituted "state rules, federal rules or regulations" for "rules, regulations" in (10)(E).

Effective Dates. Acts 2017, No. 727, § 8: Jan. 1, 2018.

4-99-106. Exemption information — Requirements.

(a) A person claiming an exemption from registration as provided by this chapter shall keep full and accurate records in a form that will enable the person to provide to the Secretary of State or the Attorney General upon request the information required to substantiate an exemption under this chapter.

(b) The information provided under this section shall be verified by a declaration signed under penalty of perjury by each principal of the person claiming exemption.

History. Acts 1993, No. 137, § 5; 2017, No. 728, § 4.

Amendments. The 2017 amendment, in (a), substituted "A person" for "Any person", substituted "in a form that" for "in such form as", and inserted "Secretary of State or the".

Effective Dates. Acts 2017, No. 727, § 8: Jan. 1, 2018.

4-99-107. Bond requirement — Promotions — Notice prior to inception.

(a)(1) A telephonic seller shall maintain a bond issued by a surety company authorized to do business in this state.

(2) The bond shall be in the amount of fifty thousand dollars ($50,000) in favor of the State of Arkansas for the benefit of a person suffering injury or loss by reason of a violation of this chapter, to be paid under the terms of any order of a court of competent jurisdiction obtained by the Attorney General or prosecuting attorney as a result of a violation of this chapter.

(3) A copy of the bond shall be filed with the Secretary of State.

(b)(1) At least ten (10) days before the inception of a promotion offering a premium with an actual market value or advertised value of five hundred dollars ($500) or more, the telephonic seller shall notify the Secretary of State in writing of the details of the promotion, describing the premium, its current market value, the value at which it

is advertised or held out to the consumer, the date the premium shall be awarded, and the conditions under which the award shall be made.

(2)(A)(i) The telephonic seller shall maintain an additional bond for the total current market value or advertised value, whichever is greater, of the premiums held out or advertised to be available to a purchaser or recipient.

(ii) A copy of the bond shall be filed with the Secretary of State.

(B) The bond or portion thereof necessary to cover the cost of the award shall be forfeited if the premium is not awarded to a bona fide customer within thirty (30) days of the date disclosed as the time of award or other time required by law.

(C) A person suffering injury or loss by reason of any violation of this chapter shall be paid the proceeds of the bond, or shall be paid under the terms of any order of a court of competent jurisdiction obtained by the Attorney General or prosecuting attorney as a result of any violation of this chapter.

(D) The bond shall be maintained until the seller files with the Secretary of State proof that the premium was awarded.

History. Acts 1993, No. 137, § 13; 2017, No. 728, § 5.

Amendments. The 2017 amendment redesignated part of former (a)(1) as present (a)(2) and redesignated former (a)(2) as (a)(3); substituted "Secretary of State" for "Consumer Protection Division of the Office of the Attorney General" in (a)(3); substituted "Secretary of State" for "Attorney General" in (b)(1) and (b)(2)(D); redesignated (b)(2)(A) as (b)(2)(A)(i) and (ii); substituted "Secretary of State" for "division" in (b)(2)(A)(ii); in (b)(2)(C), substituted "A" for "The proceeds of the bond shall be paid to any" and inserted "shall be paid the proceeds of the bond"; and made stylistic changes.

Effective Dates. Acts 2017, No. 727, § 8: Jan. 1, 2018.

4-99-108. Information to be provided each prospective purchaser.

(a) If the telephonic seller represents or implies that a prospective purchaser will receive, without charge therefor, certain specific items, or one (1) item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, awards, or otherwise, the seller shall provide, at the time the solicitation is made and prior to consummation of any sales transaction, the following:

(1) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(2) The odds a single prospective purchaser has of receiving each described item;

(3) All state rules, federal rules or regulations, terms, and conditions a prospective purchaser must meet in order to receive the item;

(4) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location; and

(5) The total number of individuals who have actually received from the telephonic seller, during the preceding twelve (12) months or, if the seller has not been in business that long, during the period the seller

has been in business, the item having the greatest value and the item with the smallest odds of being received.

(b) No seller shall make or authorize the making of any reference to its compliance with this chapter to any prospective or actual purchaser.

(c)(1) A person making or transmitting a telephone solicitation shall not display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(2) Subdivision (c)(1) of this section does not apply to the transmission of a caller identification service by a telecommunications provider that complies with § 23-17-122.

History. Acts 1993, No. 137, §§ 7, 9; 2003, No. 1465, § 4; 2019, No. 315, § 141; 2019, No. 677, § 4.

A.C.R.C. Notes. Acts 2019, No. 677, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) The citizens of this state are being negatively affected by illegal robocalls from telemarketers and from others seeking to perpetrate scams on them;

"(2) While these illegal robocalls are frustrating for most, the robocalls are costly and dangerous for far too many Arkansans;

"(3) An alarming number of illegal robocalls originate from scammers using automatic telephone dialing systems to send out thousands of phone calls per minute with fictitious or misleading names or telephone numbers displaying on unsuspecting consumers' telephone caller identification service;

"(4) These scammers are engaging in insidious schemes and targeting seniors and other vulnerable groups by soliciting personal information such as credit or debit card information and Social security numbers;

"(5) Displaying fictitious or misleading names or telephone numbers, or 'spoofing', is the predominant means by which a robocaller protects their identities and entices consumers to answer the telephone; and

"(6) Spoofing is the gateway for illegal robocalls and scams.

"(b) It is the intent of the General Assembly:

"(1) To protect the citizens of this state from being spoofed by receiving illegal robocalls from telemarketers and from others seeking to perpetrate scams on unsuspecting or vulnerable citizens;

"(2) To provide the citizens of this state who use a caller identification service with accurate information about the identities and locations of callers;

"(3) To encourage telecommunications providers to swiftly implement technologies that will allow telecommunications providers to identify and stop illegal calling practices; and

"(4) That this act be construed as broadly as possible to ensure that the citizens of this state are protected from the negative impact of illegal robocalls and to ensure that scammers and complicit telecommunications providers are held criminally accountable".

Amendments. The 2019 amendment by No. 315 substituted "state rules, federal rules or regulations" for "rules, regulations" in (a)(3).

The 2019 amendment by No. 677 substituted "A person making or transmitting a telephone solicitation shall not" for "No telephonic seller under this section shall" in (c)(1); and added "that complies with § 23-17-122" in (c)(2).

4-99-109. Irrevocable consent appointing Secretary of State to act as seller's attorney to receive service — Conditions of effective service.

(a) A telephonic seller shall file with the Secretary of State, in the form prescribed by the Secretary of State, an irrevocable consent appointing the Secretary of State to act as the seller's attorney to

receive service of any lawful process in any noncriminal suit, action, or proceeding against the seller or the seller's successor, executor, or administrator, that may arise under this chapter, when the agent designated in the seller's registration filing cannot with reasonable diligence be found at the address designated or if no agent has been designated pursuant thereto.

(b) When service is made upon the Secretary of State in conformance with this section, it has the same force and validity as if served personally on the seller.

(c) Service may be made by leaving a copy of the process with the Secretary of State, but service is not effective until both of the following are done:

(1) When service is effected under this section, the plaintiff shall forthwith send by certified first class mail, return receipt requested, a notice of the service and a copy of the process to the defendant or respondent at the last address on file with the Secretary of State; and

(2) The plaintiff's affidavit of compliance with this section shall be filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

History. Acts 1993, No. 137, § 8; 2017, No. 728, § 6.

Amendments. The 2017 amendment substituted "Secretary of State" for "Attorney General" in the section heading and throughout (a) and (b); rewrote the introductory language of (c); substituted "Secretary of State" for "Consumer Protection Division" in (c)(1); and made stylistic changes.

Effective Dates. Acts 2017, No. 727, § 8: Jan. 1, 2018.

4-99-110. Soliciting prospective purchasers on behalf of unregistered telephonic seller prohibited — Violation.

(a)(1) A salesperson shall not solicit prospective purchasers on behalf of a telephonic seller who is not currently registered with the Secretary of State under this chapter.

(2) A salesperson who violates this section shall be guilty of a Class A misdemeanor.

(b) Except as provided in subdivision (a)(1) of this section, any person, including without limitation the seller, a salesperson, agent or representative of the seller, or an independent contractor, who willfully violates a provision of this chapter or who directly or indirectly employs a device, scheme, or artifice to deceive in connection with the offer or sale by a telephonic seller, or who willfully, directly or indirectly, engages in any act, practice, or course of business that operates or would operate as fraud or deceit upon a person in connection with a sale by a telephonic seller shall be, upon conviction, guilty of a Class D felony.

(c)(1) A person who controls a seller liable under this section, or a salesperson liable under subdivision (a)(1) of this section, every partner, officer, or director of such a seller or salesperson, a person occupying a similar status or performing a similar function, and an employee of such a seller or salesperson who materially aids in the sale or attempted sale are also liable jointly and severally with and to the same

extent as the seller or salesperson, unless the nonseller or nonsalesperson who is so liable sustains the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(2) There is contribution as in cases of contract among the several persons so liable.

History. Acts 1993, No. 137, §§ 10, 11; 2017, No. 728, § 7.

Amendments. The 2017 amendment redesignated (a) as (a)(1) and (2); substituted "Secretary of State" for "Consumer Protection Division" in (a)(1); substituted "subdivision (a)(1)" for "subsection (a)" in (b); redesignated (c) as (c)(1) and (2); substituted "subdivision (a)(1)" for "subsection (a)" in (c)(1); and made stylistic changes.

Effective Dates. Acts 2017, No. 727, § 8: Jan. 1, 2018.

Subchapter 3 — Caller Identification Blocking by Telephonic Sellers

SECTION.

4-99-302. Prohibition.

(a) It is a violation of this subchapter for any person to make or transmit a telephone solicitation while using any method, including, but not limited to, per call blocking or per line blocking, that prevents caller identification information for the telephone solicitor's lines used to make telephone calls to a consumer from being shown by a device capable of displaying caller identification information.

(b)(1) It is a violation of this subchapter for a person making or transmitting a telephone solicitation by any method to display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(2) Subdivision (b)(1) of this section does not apply to the transmission of a caller identification service by a telecommunications provider that complies with § 23-17-122.

History. Acts 1999, No. 1361, § 1; 2003, No. 1465, § 6; 2019, No. 677, § 5.

A.C.R.C. Notes. 2019, No. 677, § 1, provided: "Legislative findings and intent.

"(a) The General Assembly finds that:

"(1) The citizens of this state are being negatively affected by illegal robocalls from telemarketers and from others seeking to perpetrate scams on them;

"(2) While these illegal robocalls are frustrating for most, the robocalls are costly and dangerous for far too many Arkansans;

"(3) An alarming number of illegal robocalls originate from scammers using automatic telephone dialing systems to send out thousands of phone calls per minute with fictitious or misleading names or telephone numbers displaying on unsuspecting consumers' telephone caller identification service;

"(4) These scammers are engaging in insidious schemes and targeting seniors and other vulnerable groups by soliciting personal information such as credit or debit card information and Social security

numbers;

"(5) Displaying fictitious or misleading names or telephone numbers, or 'spoofing', is the predominant means by which a robocaller protects their identities and entices consumers to answer the telephone; and

"(6) Spoofing is the gateway for illegal robocalls and scams.

"(b) It is the intent of the General Assembly:

"(1) To protect the citizens of this state from being spoofed by receiving illegal robocalls from telemarketers and from others seeking to perpetrate scams on unsuspecting or vulnerable citizens;

"(2) To provide the citizens of this state who use a caller identification service with accurate information about the identities and locations of callers;

"(3) To encourage telecommunications providers to swiftly implement technologies that will allow telecommunications providers to identify and stop illegal calling practices; and

"(4) That this act be construed as broadly as possible to ensure that the citizens of this state are protected from the negative impact of illegal robocalls and to ensure that scammers and complicit telecommunications providers are held criminally accountable."

Amendments. The 2019 amendment added "that complies with § 23-17-122" in (b)(2); and made a stylistic change.

4-99-303. Penalties — Remedies — Enforcement.

(a) When a person violates this subchapter or a rule prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined in § 4-88-101 et seq. pertaining to deceptive trade practices.

(b)(1) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. shall be available to the Attorney General for enforcement of this subchapter.

(2) The remedies and penalties provided by this section are cumulative to each other and the remedies or penalties available under all other laws of this state.

History. Acts 1999, No. 1361, § 1; 2019, No. 315, § 142.

Amendments. The 2019 amendment substituted "rule" for "regulation" in (a).

CHAPTER 106

DISCOUNT CARDS

SUBCHAPTER.

2. Health-Related Cash Discount Cards.

Subchapter 2 — Health-Related Cash Discount Cards

SECTION.

4-106-202. Penalty.

4-106-201. Prohibited practices.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statute Forbidding Unfair Trade Practice or Competition by Discriminatory Allowance of Rebates, Com-

missions, Discounts, or the Like. 83 A.L.R.6th 419.

4-106-202. Penalty.

(a) The Attorney General, any person, firm, private corporation, municipal or other public corporation, or trade association may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and for the recovery of damages.

(b) Any person subject to liability under this section shall be deemed as a matter of law to have purposely availed himself or herself of the privileges of conducting activities within Arkansas sufficient to subject the person to the personal jurisdiction of the circuit court hearing an action brought pursuant to this subchapter.

(c) An action for violation of this section may be brought:

(1) In the county where the plaintiff resides;

(2) In the county where the plaintiff conducts business;

(3) In the county where the card or other purchasing mechanism or device was sold, marketed, promoted, advertised, or otherwise distributed; or

(4) In the Pulaski County Circuit Court if the action is initiated by the Attorney General.

(d)(1) If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this subchapter, it shall enjoin the defendant from a continuance thereof.

(2) It shall not be necessary, except to recover for actual damages under subdivision (d)(3)(B) of this section, that actual damages to the plaintiff be alleged or proved.

(3) In addition to injunctive relief, the plaintiff in the action shall be entitled to recover from the defendant:

(A) Whichever is greater:

(i) One hundred dollars ($100) per card or other purchasing mechanism or device sold, marketed, promoted, advertised, or otherwise distributed within the State of Arkansas; or

(ii) Ten thousand dollars ($10,000);

(B) Three (3) times the amount of the actual damages, if any, sustained;

(C) Reasonable attorney's fees;

(D) Costs; and

(E) Any other relief which the court deems proper.

(e)(1) All actions under this section shall be commenced within two (2) years after the date on which the violation of this subchapter occurs or within two (2) years after the person bringing the action discovers or in the exercise of reasonable diligence should have discovered the occurrence of the violation of this subchapter.

(2) The period of limitation provided in this section may be extended for a period of one hundred eighty (180) days if the person bringing the action proves by a preponderance of the evidence that the failure to timely commence the action was caused by the defendant's engaging in

conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

(f)(1) Any defendant in an action brought under the provisions of this subchapter may be required to testify under § 16-43-211 and as otherwise provided by law.

(2) In addition, the books and records of the defendant may be brought into court and introduced, by reference, into evidence.

(g) The remedies prescribed in this section are cumulative and in addition to the remedies prescribed in the Deceptive Trade Practices Act, § 4-88-101 et seq., and any other applicable criminal, civil, or administrative penalties.

History. Acts 1999, No. 1406, § 2; 2005, No. 875, §§ 3, 4; 2013, No. 1148, § 3.

CHAPTER 107

CREDIT CARDS

SUBCHAPTER.

3. Unauthorized Use of Credit Cards.

Subchapter 3 — Unauthorized Use of Credit Cards

4-107-302. Definitions.

As used in this subchapter:

(1) "Authorized user" means a person granted express, implied, or apparent authority to use a cardholder's credit card or credit card number;

(2) "Cardholder" means the named credit card account member and co-applicant who applies for or accepts the terms and conditions of a credit card account;

(3) "Charges" means purchases, cash advances, annual membership fees, delinquent payment fees, insufficient fund fees, over-the-limit credit fees, or other amounts incurred through the use of the credit card;

(4) "Credit card" means an instrument or device, whether known as a credit card, charge card, credit plate, courtesy card, identification card, or by any other name, that:

(A) Is issued by a credit card issuer with or without a fee;

(B) Has an assigned account number; and

(C) Is for the use of the cardholder to obtain money, goods, services, or anything of monetary value, on credit, in possession, or in consideration of an undertaking or guaranty by the credit card issuer

of the payment of a check drawn by the cardholder on a promise to pay, in part or in full, at a future time whether or not any part of the indebtedness that is represented by the promise to make a deferred payment is secured or unsecured;

(5) "Credit card account" means a line of credit offered by a credit card issuer to a cardholder for the use of a credit card;

(6) "Credit card agreement" means the terms and conditions governing the use of the credit card account;

(7) "Credit card issuer" means a person who issues a credit card or the agent of a person with respect to a credit card;

(8) "Creditor" means a person, business, financial institution, or commercial enterprise that owns the credit card account;

(9) "Data" means the information maintained on the cardholder's account by the original creditor, credit card issuer, or succeeding creditor in the regular course of business and transferred as part of an assignment or sales agreement to the present creditor or owner of the account electronically or otherwise from which information the present creditor or owner has compiled;

(10) "Financial institution" means:

(A) A banking institution that may issue credit cards under any state or federal law;

(B) A banking subsidiary owned by a bank holding company as defined in 12 U.S.C. § 1841 or by a savings and loan holding company as defined in 12 U.S.C. § 1467a(a)(1)(D); or

(C) Any federally regulated banking institution;

(11) "Interest" means a payment to compensate a creditor or prospective creditor for making an extension of credit, making available a line of credit, or for a borrower's default or breach of a condition on which credit was extended; and

(12) "Terms and conditions" means the general and special arrangements, provisions, requirements, rules, specifications, and standards that form an integral part of a credit card agreement between the credit card issuer and the cardholder.

History. Acts 2003, No. 274, § 1; 2013, No. 1495, § 1.

4-107-304. Acceptance of credit card agreement.

The acceptance of the terms and conditions of a credit card account by a cardholder may be established as binding and enforceable by:

(1) The written or electronic signature or other electronic record of acceptance by the cardholder; or

(2) The use of the credit card account by the named credit card account member, any coapplicant, or any authorized user if the credit card agreement provides that any use of the credit card account constitutes an acceptance of the terms and conditions of the credit card agreement if the time prescribed in 12 C.F.R. § 202.12(b) has expired.

History. Acts 2013, No. 1495, § 2.

4-107-305. Liability.

(a) A cardholder is personally liable for charges and interest incurred by the named credit card account member, any coapplicant, or any authorized user on the credit card account of the cardholder.

(b) A cardholder is not liable for charges and interest incurred on the credit card account as a result of fraudulent activity by another person.

History. Acts 2013, No. 1495, § 2.

4-107-306. Amount owed.

(a) A creditor may establish a presumption of correctness of its ownership of the credit card account and the amount of the charges and interest that is owed on a credit card account by:

(1) Filing a copy of the credit card issuer's final billing statement or charge-off statement; or

(2) Filing a compilation of the data maintained by the original creditor, credit card issuer, or succeeding creditor in the regular course of business.

(b) The cardholder may dispute the presumption with any credible evidence as allowed by state or federal law.

History. Acts 2013, No. 1495, § 2.

4-107-307. Interest rate.

A creditor may establish the contracted interest rate for a credit card account by:

(1) Documenting the acceptance of the terms and conditions that contain a stated or variable interest rate by a cardholder of the credit card account; or

(2) Any billing statement generated by the credit card issuer that contains a stated or variable interest rate.

History. Acts 2013, No. 1495, § 2.

CHAPTER 108

FUEL AND LUBRICANTS

SUBCHAPTER.

2. Quality Specifications.

Subchapter 2 — Quality Specifications

SECTION.

4-108-202. Scope.

4-108-204. Administration — Adoption of standards — Rules.

4-108-205. State Petroleum Products Division — General duties and powers.

SECTION.

4-108-202. Scope.

(a) This subchapter establishes a sampling, testing, and enforcement program, requires registration of engine fuels, and empowers the state to promulgate rules as needed to carry out the provisions of this subchapter.

(b) It also provides for administrative, civil, and criminal penalties.

History. Acts 2001, No. 586, § 2; 2019, No. 315, § 143.

Amendments. The 2019 amendment substituted "rules" for "regulations" in (a).

4-108-204. Administration — Adoption of standards — Rules.

(a) The provisions of this subchapter shall be administered by the Director of the State Plant Board.

(b)(1)(A) For the purpose of administering and giving effect to the provisions of this subchapter, the State Plant Board may adopt the specification and test method standards set forth in both the most recent edition of the National Institute of Standards and Technology Handbook 130 and the most recent edition of the Annual Book of ASTM Standards and supplements thereto, and revisions thereof.

(B) When no ASTM International standard exists, other generally recognized national consensus standards may be used.

(2) The board is empowered to write rules on the advertising, posting of prices, labeling, standards for, and identity of fuels, petroleum products, and automotive lubricants and is authorized to establish a testing laboratory.

History. Acts 2001, No. 586, § 4; 2019, No. 315, § 144.

Amendments. The 2019 amendment deleted "and regulations" following "rules" in (b)(2).

4-108-205. State Petroleum Products Division — General duties and powers.

(a) There is hereby created a State Petroleum Products Division located for administrative purposes within the Arkansas Bureau of Standards.

(b) The State Plant Board shall have the authority to:

(1) Enforce and administer all the provisions of this subchapter by inspections, analyses, and other appropriate actions;

(2)(A)(i) Have access during normal business hours to all places where engine fuels, petroleum products, and automotive lubricants are kept, transferred, offered, exposed for sale, or sold for the purpose of examination, inspection, taking of samples, and investigation.

(ii) As used in subdivision (b)(2)(A)(i) of this section, "engine fuels" does not include aviation fuel.

(B) If a representative of the board is denied access by the owner or agent or other persons leasing the place where engine fuels, petroleum products, or automotive lubricants are kept, transferred, offered, exposed for sale, or sold for the purpose of examination, inspection, taking of samples, and investigation, the Director of the State Plant Board may obtain an administrative search warrant from a court of competent jurisdiction;

(3)(A) Collect, or cause to be collected, samples of engine fuels, petroleum products, and automotive lubricants marketed in this state, and cause the samples to be tested or analyzed for compliance with the provisions of this subchapter.

(B) As used in subdivision (b)(3)(A) of this section, "engine fuels" does not include aviation fuel;

(4)(A) Define engine fuels for special use and refuse, revoke, suspend, or issue a stop-order if an engine fuel for special use is found not to be in compliance with this subchapter and remand a stop-order if the engine fuel for special use is brought into full compliance with this subchapter.

(B) As used in subdivision (b)(4)(A) of this section, "engine fuels" does not include aviation fuel;

(5)(A) Issue a stop-sale order for any engine fuel, petroleum product, and automotive lubricant found not to be in compliance with this subchapter and remand the stop-sale order if the engine fuel, petroleum product, or automotive lubricant is brought into full compliance with this subchapter.

(B) As used in subdivision (b)(5)(A) of this section, "engine fuel" does not include aviation fuel;

(6)(A) Refuse, revoke, or suspend the registration of an engine fuel, petroleum product, or automotive lubricant.

(B) As used in subdivision (b)(6)(A) of this section, "engine fuel" does not include aviation fuel; and

(7) Delegate to appropriate personnel any of these responsibilities for the proper administration of this subchapter.

History. Acts 2001, No. 586, § 5; 2019, No. 606, § 1.

Amendments. The 2019 amendment redesignated (b)(1)(A) as (b)(1) and redesignated the remaining subdivisions accordingly; added (b)(2)(A)(ii), (b)(3)(B), (b)(4)(B), (b)(5)(B), and (b)(6)(B); rewrote (b)(2)(B); in (b)(4)(A), inserted "an engine fuel for special use is" and inserted "with this subchapter"; inserted "with this subchapter" in (b)(5)(A); and made stylistic changes.

4-108-209. Criminal penalties.

Any person who intentionally violates any provision of this subchapter or rules promulgated thereto shall be guilty of a Class A misdemeanor.

History. Acts 2001, No. 586, § 9; 2019, No. 315, § 145.

Amendments. The 2019 amendment substituted "rules" for "regulations".

4-108-212. Rules.

(a) The State Plant Board may by rule adopted pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., adopt as a rule of the Arkansas Bureau of Standards specifications, tolerances, and regulations for engine fuels, petroleum products, and automotive lubricants set out in National Institute of Standards and Technology Handbook 130, or in any similar publication issued by the National Institute of Standards and Technology.

(b) In drafting the rules, the bureau shall consider whether the specifications, tolerances, and regulations published by the National Institute of Standards and Technology are consistent with the needs of Arkansas businesses and consumers and may modify, amend, or delete suggested language found in the National Institute of Standards and Technology handbooks.

History. Acts 2001, No. 586, § 12; 2019, No. 315, § 146.

Amendments. The 2019 amendment substituted "Rules" for "Regulations" in the section heading; substituted "rule" for "regulation" twice in (a); and substituted "rules" for "regulations" in (b).

4-108-213. Rules to be unaffected by repeal of prior enabling statute.

The adoption of this subchapter or any of its provisions shall not affect any rules promulgated pursuant to the authority of any earlier enabling statute unless inconsistent with this subchapter or modified or revoked by the State Plant Board.

History. Acts 2001, No. 586, § 13; 2019, No. 315, § 147.

Amendments. The 2019 amendment substituted "Rules" for "Regulations" in the section heading; and substituted "rules" for "regulations" in the section.

CHAPTER 110

PERSONAL INFORMATION PROTECTION ACT

SECTION.

4-110-101. Short title.

RESEARCH REFERENCES

Ark. L. Rev. Daveante Jones, Comment: Protecting Biometric Information in Arkansas, 69 Ark. L. Rev. 117 (2016).

4-110-102. Findings and purpose.

RESEARCH REFERENCES

Ark. L. Rev. Daveante Jones, Comment: Protecting Biometric Information in Arkansas, 69 Ark. L. Rev. 117 (2016).

4-110-103. Definitions.

As used in this chapter:

(1)(A) "Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by a person or business.

(B) "Breach of the security of the system" does not include the good faith acquisition of personal information by an employee or agent of the person or business for the legitimate purposes of the person or business if the personal information is not otherwise used or subject to further unauthorized disclosure;

(2)(A) "Business" means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, including a financial institution organized, chartered, or holding a license or authorization certificate under the law of this state, any other state, the United States, or of any other country or the parent or the subsidiary of a financial institution.

(B) "Business" includes:

(i) An entity that destroys records; and

(ii) A state agency;

(3) "Customer" means an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business;

(4) "Individual" means a natural person;

(5) "Medical information" means any individually identifiable information, in electronic or physical form, regarding the individual's medical history or medical treatment or diagnosis by a healthcare professional;

(6) "Owns or licenses" includes, but is not limited to, personal information that a business retains as part of the internal customer account of the business or for the purpose of using the information in transactions with the person to whom the information relates;

(7) "Personal information" means an individual's first name or first initial and his or her last name in combination with any one (1) or more of the following data elements when either the name or the data element is not encrypted or redacted:

(A) Social Security number;

(B) Driver's license number or Arkansas identification card number;

(C) Account number, credit card number, or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account;

(D) Medical information; and

(E)(i) Biometric data.

(ii) As used in this subdivision (7)(E), "biometric data" means data generated by automatic measurements of an individual's biological characteristics, including without limitation:

(a) Fingerprints;

(b) Faceprint;

(c) A retinal or iris scan;

(d) Hand geometry;

(e) Voiceprint analysis;

(f) Deoxyribonucleic acid (DNA); or

(g) Any other unique biological characteristics of an individual if the characteristics are used by the owner or licensee to uniquely authenticate the individual's identity when the individual accesses a system or account;

(8)(A) "Records" means any material that contains sensitive personal information in electronic form.

(B) "Records" does not include any publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number; and

(9) "State agencies" or "state agency" means any agency, institution, authority, department, board, commission, bureau, council, or other agency of the State of Arkansas supported by cash funds or the appropriation of state or federal funds.

History. Acts 2005, No. 1526, § 1; 2019, No. 1030, § 1.

Amendments. The 2019 amendment added (7)(E).

4-110-104. Protection of personal information.

RESEARCH REFERENCES

Ark. L. Rev. Daveante Jones, Comment: Protecting Biometric Information in Arkansas, 69 Ark. L. Rev. 117 (2016).

4-110-105. Disclosure of security breaches.

(a)(1) Any person or business that acquires, owns, or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to any resident of Arkansas whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(2) The disclosure shall be made in the most expedient time and manner possible and without unreasonable delay, consistent with the

legitimate needs of law enforcement as provided in subsection (c) of this section, or any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the data system.

(b)(1) A person or business that maintains computerized data that includes personal information that the person or business does not own shall notify the owner or licensee that there has been a breach of the security of the system immediately following discovery if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(2) If a breach of the security of a system affects the personal information of more than one thousand (1,000) individuals, the person or business required to make a disclosure of the security breach under subdivision (b)(1) of this section shall, at the same time the security breach is disclosed to an affected individual or within forty-five (45) days after the person or business determines that there is a reasonable likelihood of harm to customers, whichever occurs first, disclose the security breach to the Attorney General.

(c)(1) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation.

(2) The notification required by this section shall be made after the law enforcement agency determines that it will not compromise the investigation.

(d) Notification under this section is not required if, after a reasonable investigation, the person or business determines that there is no reasonable likelihood of harm to customers.

(e) For purposes of this section, notice may be provided by one (1) of the following methods:

(1) Written notice;

(2) Electronic mail notice if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in 15 U.S.C. § 7001, as it existed on January 1, 2005; or

(3)(A) Substitute notice if the person or business demonstrates that:

(i) The cost of providing notice would exceed two hundred fifty thousand dollars ($250,000);

(ii) The affected class of persons to be notified exceeds five hundred thousand (500,000); or

(iii) The person or business does not have sufficient contact information.

(B) Substitute notice shall consist of all of the following:

(i) Electronic mail notice when the person or business has an electronic mail address for the subject persons;

(ii) Conspicuous posting of the notice on the website of the person or business if the person or business maintains a website; and

(iii) Notification by statewide media.

(f) Notwithstanding subsection (e) of this section, a person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information

and is otherwise consistent with the timing requirements of this section shall be deemed to be in compliance with the notification requirements of this section if the person or business notifies affected persons in accordance with its policies in the event of a breach of the security of the system.

(g)(1) A person or business shall retain a copy of the written determination of a breach of the security of a system and supporting documentation for five (5) years from the date of determination of the breach of the security of the system.

(2) If the Attorney General submits a written request for the written determination of the breach of the security of the system, the person or business shall send a copy of the written determination of the breach of the security of the system and supporting documentation to the Attorney General no later than thirty (30) days after the date of receipt of the request.

(3) The determination and documentation retained under this subsection are confidential and not subject to public disclosure.

History. Acts 2005, No. 1526, § 1; 2019, No. 1030, §§ 2, 3.

Amendments. The 2019 amendment added the (b)(1) designation; substituted "licensee that there has been a breach" for "licensee of the information of any breach" in (b)(1); added (b)(2); added (g); and made a stylistic change.

RESEARCH REFERENCES

Ark. L. Rev. Daveante Jones, Comment: Protecting Biometric Information in Arkansas, 69 Ark. L. Rev. 117 (2016).

John Ogle, Comment: Identities Lost: Enacting Federal Law Mandating Disclosure & Notice After a Data Security Breach, 72 Ark. L. Rev. 221 (2019).

4-110-108. Penalties.

RESEARCH REFERENCES

Ark. L. Rev. Daveante Jones, Comment: Protecting Biometric Information in Arkansas, 69 Ark. L. Rev. 117 (2016).

CHAPTER 111

CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT

4-111-103. Unlawful acts — Exceptions.

RESEARCH REFERENCES

ALR. Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications. 88 A.L.R.6th 319.

Claims Concerning Use of "Cookies" To Acquire Internet Users' Web Browsing

Data Under Federal Law. 36 A.L.R. Fed. 3d Art. 5 (2018).

U. Ark. Little Rock L. Rev. J. Lyn Entrikin, The Right of Privacy in Arkansas: A Progressive State, 35 U. Ark. Little Rock L. Rev. 439 (2013).

CHAPTER 113

CONNECT ARKANSAS BROADBAND PROGRAM

[Repealed.]

4-113-101, 4-113-102. [Repealed.]

Publisher's Notes. These sections, concerning short title and definitions, were repealed by Acts 2019, No. 1091, § 1, effective July 24, 2019. The sections were derived from the following sources:

4-113-101. Acts 2007, No. 604, § 1.

4-113-102. Acts 2007, No. 604, § 1; 2009, No. 947, § 1.

4-113-103. [Repealed.]

Publisher's Notes. This section, concerning Connect Arkansas, nonprofit organization, purposes and grants, was repealed by Acts 2017, No. 426, § 1. The section was derived from Acts 2007, No. 604, § 1; 2009, No. 947, § 2; 2011, No. 719, § 5; 2015 (1st Ex. Sess.), No. 7, § 63; 2015 (1st Ex. Sess.), No. 8, § 63.

4-113-104. [Repealed.]

A.C.R.C. Notes. Section 4-113-104 was amended by Acts 2019, No. 910, §§ 129, 130 to substitute "Secretary of the Department of Commerce" for "Governor" in (a)(2) and "Director" for "Executive Director" preceding "of the Arkansas Economic Development Commission" in (b)(5). However, § 4-113-104 was specifically repealed by Acts 2019, No. 1091, § 1.

Publisher's Notes. This section, concerning creation of the Arkansas Broadband Council, was repealed by Acts 2019, No. 1091, § 1, effective July 24, 2019. The section was derived from Acts 2007, No. 604, § 1; 2009, No. 947, § 3; 2011, No. 599, § 1; 2015 (1st Ex. Sess.), No. 7, § 64; 2015 (1st Ex. Sess.), No. 8, § 64; 2019, No. 910, §§ 129, 130.

4-113-105. [Repealed.]

Publisher's Notes. This section, concerning broadband service registration, was repealed by Acts 2017, No. 426, § 2. The section was derived from Acts 2007, No. 604, § 1.

4-113-106. [Repealed.]

Publisher's Notes. This section, concerning legislative findings, critical infrastructure, and priority of county economic development plans that include regional broadband collaboration, was repealed by Acts 2019, No. 1091, § 1, effective July 24, 2019. The section was derived from Acts 2009, No. 947, § 4.

CHAPTER 118

PREPAID MOBILE DEVICE PROTECTION ACT

4-118-101. Title.

This chapter shall be known and may be cited as the "Prepaid Mobile Device Protection Act".

History. Acts 2019, No. 1053, § 1.

4-118-102. Definitions.

As used in this chapter:

(1) "Minor" means an individual under eighteen (18) years of age;

(2)(A) "Person" means an individual who is not related to a minor.

(B) "Person" does not mean a parent or grandparent, including without limitation a biological parent, adoptive parent, stepparent, fictive kin, legal guardian, temporary guardian, or other legal custodian of a minor;

(3) "Prepaid mobile device" means a cellular telephone or other communication device for which the mobile device user purchases a set allotment of wireless communication services; and

(4) "Wireless communication services" means any mobile service that is provided for profit and makes interconnected service available to the public.

History. Acts 2019, No. 1053, § 1.

4-118-103. Prepaid mobile device.

It is unlawful for a person:

(1) To purchase a prepaid mobile device or refill a prepaid mobile device with wireless communication services on a previously purchased prepaid mobile device for a minor in this state; or

(2) To provide funds to a minor for the purpose of purchasing a prepaid mobile device or refilling a prepaid mobile device with wireless communication services on a previously purchased prepaid mobile device in this state.

History. Acts 2019, No. 1053, § 1.

4-118-104. Penalty.

A person who violates this chapter or who knowingly purchases a prepaid mobile device or wireless communication services for a minor or provides funds to a minor for the purpose of purchasing a prepaid mobile device or refilling a prepaid mobile device with wireless commu-

nication services on a previously purchased prepaid mobile device shall be guilty of a violation and upon conviction shall be fined no less than one hundred dollars ($100).

History. Acts 2019, No. 1053, § 1.

CHAPTER 119

ONLINE MARKETPLACE CONSUMER INFORM ACT

4-119-101. Title.

This chapter shall be known and may be cited as the "Online Marketplace Consumer Inform Act".

History. Acts 2021, No. 555, § 1.

4-119-102. Definitions.

As used in this chapter:

(1)(A) "Consumer product" means any tangible personal property that:

(i) Is distributed in commerce; and

(ii) Is normally used for personal, family, or household purposes.

(B) "Consumer product" includes property intended to be attached to or installed in any real property without regard to whether it is so attached or installed;

(2) "High-volume third-party seller" means a participant in an online marketplace who is a third-party seller and who, in any continuous twelve-month period during the previous twenty-four (24) months, has entered into two hundred (200) or more discrete sales or transactions of new or unused consumer products resulting in the accumulation of an aggregate total of five thousand dollars ($5,000) or more in gross revenues;

(3) "Online marketplace" means any electronically based or electronically accessed platform that:

(A) Includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States; and

(B) Hosts one (1) or more third-party sellers;

(4) "Seller" means a person who sells, offers to sell, or contracts to sell a consumer product through an online marketplace;

(5)(A) "Third-party seller" means a seller, independent of an operator, facilitator, or owner of an online marketplace, who sells, offers to

sell, or contracts to sell a consumer product in the United States through an online marketplace.

(B) "Third-party seller" does not include a seller that:

(i) Is a business entity that has made available to the general public the business entity's name, business address, and business contact information;

(ii) Has an ongoing contractual relationship with the owner of an online marketplace to provide for the manufacture, distribution, wholesaling, or fulfillment of shipments of consumer products; and

(iii) Has provided to the online marketplace identifying information, as described in § 4-119-103, that has been verified according to § 4-119-103(b); and

(6) "Verify" means to confirm information provided to an online marketplace under § 4-119-103 by the use of:

(A) A third-party or proprietary identity verification system that has the capability to confirm a seller's name, email address, physical address, and telephone number; or

(B) A combination of two-factor authentication, public records search, and the presentation of a government-issued identification.

History. Acts 2021, No. 555, § 1.

4-119-103. Online marketplace — Verification required.

(a) An online marketplace shall require a high-volume third-party seller to provide to the online marketplace within twenty-four (24) hours of becoming a high-volume third-party seller:

(1)(A)(i) Bank account information, the accuracy of which has been confirmed directly by the online marketplace, a payment processor, or other third party contracted by the online marketplace.

(ii) If the high-volume third-party seller does not have a bank account, then the name of the payee for payments issued by the online marketplace to the high-volume third-party seller.

(B) The bank account information or payee information described in subdivision (a)(1)(A)(i) or subdivision (a)(1)(A)(ii) of this section may be provided by the high-volume third-party seller:

(i) To the online marketplace; or

(ii) To a payment processor or other third party contracted by the online marketplace to maintain the information, provided that the online marketplace may obtain the information on demand from the payment processor or other third party contracted by the online marketplace;

(2)(A) Contact information for the high-volume third-party seller.

(B) As used in subdivision (a)(2)(A) of this section, "contact information" includes:

(i) If the high-volume third-party seller is an individual, a copy of a government-issued photo identification for the individual high-volume third-party seller that includes the high-volume third-party seller's name and physical address;

(ii) If the high-volume third-party seller is not an individual, then:

(a) A copy of a government-issued photo identification for an individual acting on behalf of the high-volume third-party seller that includes the individual's name and physical address; or

(b) A copy of a government-issued record or tax document that includes the business name and physical address of the high-volume third-party seller; and

(iii) A working email address and working telephone number for the high-volume third-party seller;

(3) A business tax identification number or, if the high-volume third-party seller does not have a business tax identification number, a taxpayer identification number; and

(4) Whether or not the high-volume third-party seller:

(A) Is exclusively advertising or offering a consumer product on the online marketplace; and

(B) Is currently advertising or offering for sale the same consumer product or products on any other internet websites other than the online marketplace.

(b)(1) An online marketplace shall verify:

(A) The information provided in subsection (a) of this section within three (3) days; and

(B) Any changes to the information described in subsection (a) of this section within three (3) days of receipt of any changes to the information that is provided to the online marketplace by a high-volume third-party seller.

(2) If a high-volume third-party seller provides a copy of a valid government-issued tax document, then the information contained within the tax document shall be presumed to be verified as of the date of issuance of the record or document.

(3)(A) An online marketplace shall, at least annually:

(i) Notify each high-volume third-party seller operating on the online marketplace that the high-volume third-party seller shall inform the online marketplace of any changes to the information provided by the high-volume third-party seller under subsection (a) of this section within three (3) days of receiving the notification; and

(ii) Instruct each high-volume third-party seller, as part of the notification, to electronically certify either that the high-volume third-party seller's information is unchanged or that the high-volume third-party seller is providing changes to the information described in subsection (a) of this section.

(B) If the online marketplace becomes aware that a high-volume third-party seller has not certified that the high-volume third-party seller's information is unchanged or has not provided the changed information within three (3) days of receiving the notification, then the online marketplace shall suspend the high-volume third-party seller's participation on the online marketplace until the high-volume third-party seller either certifies that the high-volume third-party seller's information is unchanged or provides the information that has changed and the information is verified.

(c) An online marketplace shall require a high-volume third-party seller in the online marketplace to provide and disclose to consumers in a conspicuous manner and in bold print on the product listing or, for information other than the high-volume third-party seller's full name, through a conspicuously placed link on the listing of the consumer product listing:

(1) The identity of the high-volume third-party seller that shall include:

(A) The full name of the high-volume third-party seller;

(B) The full physical address of the high-volume third-party seller;

(C) Whether the high-volume third-party seller also engages in the manufacturing, importing, or reselling of consumer products; and

(D)(i) Contact information for the high-volume third-party seller, including a working telephone number and working email address.

(ii) The working email address required under subdivision (c)(1)(D)(i) of this section may be provided to the high-volume third-party seller through the online marketplace if assigned to the high-volume third-party seller; and

(2) Any other information determined to be necessary to address circumvention or evasion of the requirements of this chapter if the additional information is limited to what is necessary to address such circumvention or evasion.

(d) Except as provided in subsection (b) of this section, upon the request of a high-volume third-party seller, an online marketplace may provide for partial disclosure of the identifying information required under subsection (c) of this section if:

(1) The high-volume third-party seller demonstrates to the online marketplace that the high-volume third-party seller does not have a business address and only has a residential street address, the online marketplace may:

(A) Direct the high-volume third-party seller to disclose only the country and, if applicable, the state in which the high-volume third-party seller resides on the listing of the consumer product;

(B) Inform a consumer that there is no business address available for the high-volume third-party seller; and

(C) Inform a consumer that any consumer inquiries should be submitted to the high-volume third-party seller by telephone or email;

(2) The high-volume third-party seller demonstrates to the online marketplace that the seller is a business that has a physical address for consumer product returns, then the online marketplace may direct the high-volume third-party seller to disclose the high-volume third-party seller's physical address for consumer product returns; or

(3) A high-volume third-party seller demonstrates to the online marketplace that the high-volume third-party seller only has a personal telephone number, the online marketplace shall inform consumers that there is no telephone number available for the high-volume third-party seller and that any consumer inquiries should be submitted to the high-volume third-party seller's email address.

(e) If an online marketplace becomes aware that a high-volume third-party seller has made a false representation to the online marketplace in order to justify the provision of a partial disclosure under subsection (d) of this section or that a high-volume third-party seller who has requested and received a provision for a partial disclosure under subsection (d) of this section has not provided responsive answers within a reasonable time frame to consumer inquiries submitted to the high-volume third-party seller by telephone or email address, then the online marketplace shall withdraw its provision for partial disclosure and require full disclosure of the high-volume third-party seller's identity information required under subsection (c) of this section within three (3) business days' notice to the high-volume third-party seller.

(f) An online marketplace shall disclose to a consumer, in a conspicuous manner and in bold print on the consumer product listing of any high-volume third-party seller, a reporting mechanism that allows for electronic and telephonic reporting of suspicious marketplace activity to the online marketplace and a message encouraging individuals seeking goods for purchase to report suspicious activity to the online marketplace.

(g) In addition to the requirements of subsection (f) of this section, an online marketplace that warehouses, distributes, or otherwise fulfills a consumer product order shall disclose to the consumer the identification of any high-volume third-party seller supplying the consumer product if different than the seller listed on the product listing page.

History. Acts 2021, No. 555, § 1.

4-119-104. Violation of Deceptive Trade Practices Act — Enforcement.

(a) A violation of this chapter is an unfair and deceptive act or practice, as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(b) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this chapter.

History. Acts 2021, No. 555, § 1.

4-119-105. Conflicts.

A local government or any political subdivision of the state shall not establish, mandate, or otherwise require an online marketplace to verify information from a high-volume third-party seller on a one-time or ongoing basis or disclose information to consumers about a high-volume third-party seller.

History. Acts 2021, No. 555, § 1.